

The University of Chicago

LAW OF GUARDIAN AND WARD

A DISSERTATION SUBMITTED TO THE
FACULTY OF THE SCHOOL OF SOCIAL SERV-
ICE ADMINISTRATION IN CANDIDACY FOR
THE DEGREE OF DOCTOR OF PHILOSOPHY

1934

By
HASSELTINE BYRD TAYLOR

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PREFACE

The relationship of Guardian and Ward is one that may be said to have been neglected by students of the law. Nor has its significance been fully recognized by students of social welfare. It is mentioned in the various legal treatises on Domestic Relations, but, except in the matter of the administration of property, the treatment is generally brief and perfunctory. The situation was pointed out by a well-known jurist in 1897 who said "The law relating to Guardians of Minors and of Persons of Unsound Mind has not, so far as I am aware, been treated by any text-writer, except as included in books of a more general scope."¹ Little has been done since that time to enlarge the knowledge of the subject. A survey of the history of the law of Guardian and Ward, however, reveals much new material which makes the development of the present laws more intelligible. The significance of Borough guardianship law has, for example, heretofore not been properly recognized, particularly in its relation to American guardianship law. The early American law on guardianship offers much of interest and may be contrasted in many ways with the law of England of the same period.

Economic and social conditions have changed greatly during the past century, especially since 1900, while the law has admittedly lagged behind. The growing realization of the super-parental authority of the state which has manifested itself in child labor regulation and compulsory school attendance laws has not been matched by progressive measures for meeting the corresponding responsibility. Legal provision for the guardianship of minors has, for example, remained unchanged. Modification of the law of guardianship, like any proposed change, must be based on a comprehensive study of the relationship, its historical developments, its present legal and administrative provisions, and developments in other fields which could be applied to the relationship to advantage. As will be learned, this relationship implies a duty on the part of the state as parens patriae. This duty is the basis of much of the social work of the time as, for example, that done in connection with the juvenile court, with the placement of children in homes and institutions, etc. Any modification

¹Woerner, American Law of Guardianship (1897), p. ii.

of the administration of the law of guardianship should embody the principles of the new profession of social work. That profession, in fact, makes possible the realization of the implications of the doctrine of parens patriae. Through public social work, the state, ever a party of guardianship proceedings, may be more effective. The extent to which social service principles are applicable to the relationship of Guardian and Ward has, however, not yet been perceived.

The following study deals with many of these aspects of the subject. The history of the law is treated briefly. The present statutes are summarized in convenient form, and some comment on their value and adequacy is offered. Suggestions for uniform legislation are made. Administrative changes and additions are proposed, which, it is thought, would bring to this relationship services designed to protect and conserve the best interests of the child.

Hasseltine Byrd Taylor

August, 1935

TABLE OF CONTENTS

PREFACE.	Page ii
Chapter	
I. INTRODUCTION.	1
II. BRIEF HISTORY OF THE ENGLISH AND AMERICAN LAW ON GUARDIANS AND MINOR WARDS	9
III. KINDS OF GUARDIANS.	31
1. Natural Guardians	
2. Testamentary Guardians	
3. Guardians Nominated by Minors	
4. Guardians in Socage	
5. Guardians Appointed by the Court	
6. Guardians Appointed by the Court Under the Uniform Veterans' Guardianship Act	
7. Guardians <u>ad litem</u>	
8. Public Guardians	
IV. DUTIES OF THE GUARDIAN.	67
1. Guardianship of the Person	
a. Expenditures	
2. Guardianship of the Estate	
a. Duties of the guardian	
b. Management of the personal estate	
c. Investments	
d. Leasing real estate	
e. Mortgaging real estate	
f. Sale of real estate	
V. JURISDICTION AND PROCEDURE.	101
1. Courts Having Jurisdiction	
2. Appointment Procedure	
a. Temporary arrangements	
b. Petition, notice, and hearing	
c. Inventory and appraisal	
d. Bond	
3. Settlements and Accountings	
4. Final Settlement	
5. Compensation of Guardians	
VI. TERMINATION OF GUARDIANSHIP	149
1. Majority or Marriage of the Ward	
2. Nomination of Another Guardian When the Ward Attains Fourteen Years of Age	
3. Resignation	

4. Removal

Page

VII. CONCLUSION.	158
BIBLIOGRAPHY	179
INDEX.	187

CHAPTER I

INTRODUCTION

With the changes which have come since the industrial revolution in the economic organization of society have also come changes in the social and legal position of the parties to the four fundamental private relationships of English law. These are the relationship of Master and Servant, of Husband and Wife, of Parent and Child and of Guardian and Ward.¹ The old common law position of the servant in relation to the master has been largely replaced by that of employee—a relationship in status has been replaced by one in contract. Liability has been transferred from the worker to the employer. The person and property of the wife have been largely emancipated from the control of the husband. This is evidenced by laws relating to the married woman's earnings and separate property rights.² Particularly during the past few decades, attention has been focused on the position of the child over against the rights of parents and guardians, and moreover, a realization has developed that the guarantee of the child's rights is a social and public as well as a private responsibility. The regulation of child labor and compulsory education legislation are examples of public restriction of the rights of parents and guardians. Social and legal changes which affect the child concern both parents and guardians.

A growing activity in child welfare work is reflected in changes in laws and their administration concerning particular aspects of child life and particular groups of children. Older statutes have been revised and new legislation has been passed to meet changing conditions and to make effective the increasing knowledge and understanding of the needs of children. Child labor

¹Blackstone, Commentaries on the Law of England (19th American ed.; 1866), chap. xvii, p. 379. Hereafter cited Blackstone.

²"There is no branch of the law which has been more completely revolutionized by statutory amendment than the law of husband and wife and the law of father and child." S. P. Breckinridge, "Separate Domicile for Married Women," Social Service Review, IV, 37.

legislation regulates hours and conditions of labor. The working age has been raised. Compulsory education legislation has been generally enacted. Children are more successfully kept out of almshouses and jails in association with adults than they formerly were. Juvenile court legislation attempts to give the dependent, neglected, and delinquent child a kinder and more individualized judicial procedure, based on investigation of the child's needs and accompanied by continued supervision and treatment. The age of criminal responsibility has in many jurisdictions been raised. Requirements of licensing and inspection attempt to insure a higher level of decency and adequacy in the care and placement of dependent children in institutions and by social agencies. In some states the laws now require trial periods and case work supervision to insure the wisdom of an adoption before final proceedings are entered upon. Illegitimacy laws are becoming more liberal and often discriminate less harshly against this unfortunate group of children born out of wedlock and their mothers. Mothers' pensions aid children to remain in their own homes. Public health measures take special notice of infant and child needs. A rise in the minimum standards for child life in general benefits all children. Though important, these standards are not the special concern of this study and therefore will not be further considered.

Apart from this general interest in child welfare, there has been little interest, or change, in the relation of Guardian and Ward as one needing special social and legal consideration. It is a relationship which is at the same time peculiarly adapted to social control and particularly in need of it. The state has an especial responsibility to children who are without the unselfish oversight of parents. The relation of Guardian and Ward is the legal substitute for that of Parent and Child. It is not enough to provide a substitute relationship without also providing means which can guarantee the quality of that substitute. In the absence of natural parents, the present law of infancy is entirely inadequate. Usually matters affecting guardianship do not create an issue of conflict between two parties which calls for judicial action but one which requires a sound social decision based on what is best for the individual child. The clearly recognized superparental authority of the state necessitates the use of those services which can bring to this relationship a responsible social control. The following study of the guardianship of minors is concerned with the nature and adequacy of legal provisions, the administrative procedures, and the possibilities offered for the utilization and development of public child welfare services.

"A guardian is a person to whom the law has entrusted the custody and control of the person or estate, or both, of an infant, whose youth, inexperience, and mental weakness disqualify him for acting for himself in the ordinary affairs of life."¹ In general, parents care for and act in behalf of their minor children, and are thus in the relation of Parent and Child. If one parent dies or becomes incapable, the other assumes the position solely. In legal terminology, parents are called the natural guardians of their children, and the relation is known as that of Parent and Child. In the absence or incompetence of both parents, a need arises for a substitute parent during the minority of the children. The relationship of Guardian and Ward indicates that of the substitute parent,² who is a legally constituted guardian to a minor ward. It involves the custody of the person or of the property or of both person and property.

With certain exceptions and limitations, it may be said that guardians of the person fill a position similar in rights, remedies and responsibilities to that of parents. The parent must support his child out of his own means and in return the child's labor and services belong to him. The guardian, on the contrary, is not bound to supply the wants of his ward, except from the ward's own estate or from the liberality of others. The guardian has no right to the services and labor of his ward. Likewise guardians of the estate fill a position similar to that of trustees. A trustee is a person to whom property is committed for the benefit of others. It is a position founded upon faith and confidence and presumed integrity. Guardianship of property differs from the function of trusteeship in that trustees may sue and be sued in their own official capacity, while suits by and against infant wards are brought in the name of the ward, not of the guardian. Trusteeship may continue for any length of time, but guardianship of the estate of a minor terminates when the infant reaches majority or before. Further distinctions between guardianship and other relationships will be evident from an analysis of the statutes.³

There have been few changes in the laws pertaining to guardianship and they stand today essentially as when they were first enacted. In the main, the legal description of guardianship

¹Schouler, Domestic Relations, sec. 283.

²Blackstone, Bk. I, chap. xvii, p. 379, says that the Guardian and Ward is plainly derived from that of Parent and Child, the guardian being only a temporary parent.

³See chap. iii, p. 31 ff.

which constitutes it a trust may be said to be satisfactory, but the provisions for administration fall far short of achieving their purposes. In the latter regard, they have failed to meet changing economic and social conditions. They continue to deal largely with the management and disposition of real estate, although today personal property is perhaps relatively more important than real property. With increasing population and mobility, the protection and guidance of the person has become more impersonal to the court and less apt to be provided extra-legally. It will be shown in the forthcoming chapters that the administrative procedures, never sufficient to carry out the spirit of the law, are now totally inadequate. The probate procedure is expensive, slow, and formal, entirely passive and retroactive, wholly lacking in facilities for social investigation, and often subject to partisan political influences. Numerous and positive, for more than a century now, have been the statutory and judicial dicta that the welfare of the child should be the first consideration of the court in appointing and supervising guardians. This is, however, but an idle phrase unless the judicial machinery provides a way to learn what is best for the individual child and to apply that knowledge in dealing with the child.

In failing to modify guardianship administration, legislators have ignored two important changes in the situation. One of these is the change of the state's role in the exercise of parental responsibility from a passive to an active role. Another change of which notice may be taken is the development of the professional service of social case work for the investigation, diagnosis, and treatment of individual situations—economic, social, and personal. The authority of the state as parens patriae has long been recognized. With increasing frequency, the acknowledgment of actual as well as theoretical authority has been stated in many important English and American cases¹ and has found widest recognition in the juvenile court movement which has resulted in legislation in all the states of the union, and has in turn given an impetus to all child welfare work. An intelligent application of the principle of active state responsibility and a full utilization of case work skill may make the administration of guardianship one of the most important and beneficial public services, and one which may be extended to include other public child welfare services. The doctrines formulated in developing the relationship of Guardian and Ward have given a legal basis for all public child welfare work, even though the particular relationship itself has

¹Numerous such cases are referred to in chap. iii.

been neglected, but it may appear that the actual application and accomplishment of the legal doctrine of parens patriae can be realized by the use of social case work.

The relation of Guardian and Ward serves as a substitute for that of Parent and Child and as an agency of the state in its duty as super-parent. The relation of Guardian and Ward creates legal means by which the ward can deal in the business world, but accomplishes little or nothing for the ward himself. It makes possible the mortgage and sale of estates and sets free resources which would otherwise be tied up during the period of infancy. It makes possible the rearing of children out of the bounty of their own estates and facilitates the expenditures of moneys to which minors could not have legally found access. For business and the world generally, the institution of guardianship probably serves its purposes reasonably well, since the relationship attracts so little attention.

It will be shown in the following study that far more important to the wards, their parents, the state and those interested in the general welfare are the social aspects of guardianship. Directly, the guardian is in the relation of trustee to his ward. Less obviously, he is a trustee of the state's interests in the ward. The second of these functions is not generally recognized, but its importance is fundamental. The responsibility of the state for the welfare of all children and particularly for the welfare of those without natural guardians has long been established. Is a ward alone able to see that the guardianship is being administered as a trust for the state? If he were, he would not need a guardian. The metaphysical entity of the state cannot serve as an actual guardian. Has the state taken proper precautions in selecting its agents and in seeing that the performance of its agents meets proper social standards?

As a social institution, guardianship in its present form is fraught with grave social dangers and actual abuses which will be discussed. These defects in the administration of guardianship arise from the fact that the role of the state has been entirely negative. There is no rule that minors without natural parents must be wards. The indifference of the state and the expense of guardianship procedure inevitably result in the failure to constitute guardians for children without estates. Minors inheriting estates are placed under the care of anyone who applies for the office of guardian unless more than one person seeks appointment. There is no state supervisory authority anywhere to require local courts to make adequate inquiry into the applicant's fitness and qualifications. Once appointed, there is scarcely any check on the way the child is cared for. If the ward is mistreated or his

funds misused during the period of infancy, he has no effectual redress without costly legal action. So long as the periodical accounts, which may be tardily rendered,¹ do not show obvious and gross error or mismanagement, they may be accepted and filed with casual examination. When guardianship draws to an end, many states permit private settlements with wards.

In exercising jurisdiction over Guardians and Wards, local courts have the responsibilities not only of the judiciary but also of a social agency. Matters pertaining to guardianship call for more than strictly legal decisions which settle issues of conflicts over rights. These matters require sound social decisions based on knowledge and human understanding, for which social training is prerequisite. In the first place, the choice of the guardian is a matter of utmost importance. Only a thorough social investigation can discover whether or no the person seeking the guardianship has an actual interest in the child, and if not, who has such an interest. Nor is interest alone enough. A guardian should have both personal and business ability. To fill the office well, the guardian must be a kind, reasonable and just person, able to distinguish between his own interest and the needs of the child and to distinguish between his own and the child's financial affairs. The ward's money is not for speculation; the guardian may do as he likes with his own. Knowledge of his habits of life and his personal relations should enter into the selection of a guardian. Apart from his personal qualifications, other matters are important. Is his social status one to which the ward can easily adjust? If it is notably inferior or superior to the ward's past surroundings and presumable future expectations, adjustment is difficult.

Even when the substitute for parenthood is once established, social service is essential. The jurisdiction of the court is continuous, and supervision is necessary to the full exercise of that jurisdiction. Both guardian and ward are in need of assistance in acquiring a normal relationship to one another. Both members of this newly established relationship are in need of interpretation, one to the other. To be happy in the new situation, the child must feel that he is wanted. The whole success of the relationship often depends upon the tact and common sense manifested during the first few weeks. On the one hand, there is

¹The U. S. Veterans' Administration, Guardianship Division, discovered that the periodical accounts were not rendered promptly and has even had difficulty in getting local courts to enforce the law on this point.

the danger that the child will be treated as a "paying guest" without duties or obligations. Such a position contrasts harmfully with that of the guardian's own children from whom a responsibility for the home is expected. On the other hand, the ward may be discriminated against and be reduced to an unfavorable position in the family group. Either position is bad. One may result in the loss of the ordinary sense of responsibility which the ward should have for himself and for those about him. The other may result in resentment, which may bring either loss of self-esteem or aggressive delinquency. If there is an abundance of money in the ward's estate, the guardian may not feel the same care in its expenditure as a parent would feel and the result may be the over-indulgence of the ward. Regardless of their self-confidence, guardians may not be able to guide and advise other children with the same assurance with which they can control their own, and may want advice at many points. At every stage of the child's development, new decisions must be made. While guardians do not necessarily have the unselfish and devoted responses to children which parents may be expected to have, they also may lack the selfish desires which cause parents to urge children to make something of themselves. The misused and wasted time of the child's youth can never be recovered. Personal maladjustments resulting from unwise or indifferent custody and training can never be entirely repaired. The lack of preparation for adult life, the failure to supply influences which make for industry and integrity, and the neglect to convey a true picture of the ward's expectations are destructive of his personality and chances for success. Effective social supervision of guardianship may prevent these disasters.

Wise supervision of guardianship should help in building up an enduring personal relationship which will carry on beyond the termination of the guardian's official duties. Legally, the guardian's responsibility ends abruptly with the ward's attainment of majority. Perhaps he may fail to show that continuous natural interest which parents have in their own children. The ward's future conduct and success cannot reflect so directly upon the guardian as upon the parent. A skilfully supervised relationship may create permanent affection and mutual respect. Although the relationship may officially come to a close, the young person will, if supervision has been adequate and successful, continue to respect and seek the advice of his elder.

The state has neither required nor enabled local courts to equip themselves with administrative facilities for making social decisions such as are needed in matters of guardianship. Nor has local public opinion demanded in any effective way the

development of the court in the capacity of a social agency. Change and improvement in the public social services have been accomplished by socially minded individuals and groups who have pointed out the need for sound public administration. An apathetic public has for centuries been content with the Elizabethan poor laws, with unsupervised orphanages and institutions for dependent children, and with other social abuses. Underprivileged groups cannot speak for themselves. Regardless of financial status, wards are in the same helpless position. The socialization of the schools which has procured vocational guidance, the visiting teacher, and special classes for the handicapped has been promoted by those interested in social welfare. More humane treatment of the insane and attempts to the rehabilitation of prisoners and socialized treatment of the juvenile offender and the improvements, few as they may be, in the administration of the poor law have been achieved by the efforts of social welfare leaders. Informed and interested students and workers in the field of social welfare must interpret the conditions and needs of these groups to the public. The public, in turn, may be stimulated to remedy the defects of the laws now in effect and create social facilities which will guarantee protection and the means of personal development to the least of these groups. In this instance, the group is made of those individual children who have or are in need of legally constituted guardians. It is the best interests of the child which are the concern of this study.

CHAPTER II

A BRIEF HISTORY OF THE GUARDIANSHIP OF MINORS IN ENGLAND AND THE UNITED STATES

From ancient times the appointment of guardians has been the method for providing care, protection, and supervision of the persons of minors who are without natural guardians and for carrying on the administration of their estates. For purposes of this study, however, the historical discussion need treat only of the law of England and of the United States. The law of England best divides itself into the period before and the period after 1660. The history of guardianship before 1660 reviews two distinct bodies of law, namely feudal guardianship and borough guardianship. The history of guardianship in England since 1660 deals with guardianship insofar as it is of importance for American Law. The history of guardianship in colonial America leads up to the survey of the present laws on guardianship of minors in the various states which are summarized in the next chapter.

Feudal guardianship law¹ is an integral part of the law governing private ownership of land tenures. The most convenient point at which to begin the consideration of the law of real property is the Norman Conquest. The whole of the land and all the proprietary rights therein were, theoretically at least, held of the king. Most of it was granted on various conditions to lords, knights, and religious orders, who in turn granted it to other tenants for agricultural and other purposes. The economic, social, and political organization was that of the manorial system. With respect to any given piece of land, four or five individuals in an ascending scale from tenant to king might have a property interest. Both lord and tenant were regarded as having a property interest in the land and as being mutually obligated to each other. The relationship was one of status rather than one of contract. The relationship between lord and tenant was technically known as tenure. There were various species of tenure. The first distinction is between free and villein or servile tenures. Since

¹See: Coke upon Littleton; Pollack and Maitland, History of English Law, Vols. I, II; Jenks, Short History of English Law; Bigelow, Introduction to the History of Real Property.

there was practically no provision for guardianship below the rank of freeholders,¹ wardships were incident to the free tenures only. These were of three sorts: military; socage; and frank-almoyn, which pertained to religious orders only and which is omitted here.

Soon after the Norman Conquest, the duty of service in the army became rooted in the land.² Each tenant holding by knight's service, or military tenure, was obligated to give armed service when called upon by his lord. But only during the first century after the Conquest were military tenures strictly military. Later they supplied an army chiefly by providing its pay and still later they supplied neither soldiers nor money adequately. An intricate body of law developed which specified the rights and fines which the lord could claim instead of the military service. In exchange for the payments and services rendered by the tenants, the lord owed them the protection of their persons and holdings which his manorial organization was able to give. At first land holdings are supposed to have been life estates only. Later they became hereditary and when they did, they descended to infants as well as to adults. If the heir were of full-age, payment was due when the land passed to the heir. If the heir were under age, the lord was entitled to keep the wardship of the body and the lands until the heir reached majority, i.e., until the ward reached the age of twenty-one years. If the ancestor had held of several lords, each got the wardship of the lands holden of him. There was intricate law as to which of them should have the wardship of the body and the right of marriage of the heir. The general rule was that these went to the lord of whom the tenant held the most ancient title. Wardship entitled the lord to the rents and profits for his own use without any accounting for them and out of the income, he was supposed to maintain the infant according to proper rank, pay the tenant's debts, and commit no waste of the estate. The principle—and not an unreasonable one—was that the infant's inability to perform the services justified the lord's using the income of the estate to provide a substitute who could perform the services. In addition to the wardship of the person and the property during the infancy of his tenants' heirs, the lord had the right to arrange their marriages to his advantage. Unless the guardian's wishes were met, the ward had to pay the value or twice the value of the marriage.

¹W. H. S. Garnett, Children and the Law (1911), chap. 1, p. 3.

²Pollack and Maitland, I, 231.

The wardships and marriages were for the profit of the guardian and not for the benefit of the ward. The lord could not only use the land himself without accounting for the profits but he could also dispose of the wardship and marriage by sale or assignment. They could be disposed of by will and could be passed like chattels to executors. Rights in both land and person were saleable. Abuses were inevitable when wardships were bought and sold for profit without apparent consideration for the personal care of the wards. The only possibility of protection for the infant was through a suit for waste brought by a 'next friend' against the lord; this might result in the lord having to forfeit the wardship. Several statutes were enacted to correct abuses but they were not successful.¹ As the centuries went by and the feudal system failed more and more to realize its purposes, the situation of these wards grew more and more grievous and burdensome.

Socage tenure was largely an agricultural tenure,² but it was also tied up with the manorial system. In contrast with military tenure, the incidents of socage tenure were fixed and definite instead of variable with the demands and inclinations of the lord. The incident of marriage did not exist at all. Wardship was, however, found in connection with socage tenure, but the guardian was accountable to the ward for all the profits of the land.³ Guardianship in socage came about when an infant under fourteen years of age inherited land held in socage. The guardian was the nearest relative who could not possibly inherit the estate. Where there were several persons of the same degree of kinship, the one obtaining first possession had the wardship of the infant. As the English law of inheritance provided only for the descent of inheritance, the father or the mother, or one of their brothers was the nearest of kin who could not inherit and one of these was frequently the guardian in socage. A socage guardian had possession of his ward's estate with power to defend and manage it. His authority was a personal trust, neither devisable nor assignable.⁴

¹Coronation Charter of Henry I (1100); Magna Carta (1215); 9 Henry III, c. 5 (1225); 3 Edward I, c. 21 (1275); 20 Edward I, Stat. 2 (1292).

²There were other socage tenures, so classified because of the certainty of the services required in connection with them.

³The Statute of Westminster, I (1275); 3 Edward I (1275).

⁴12 Ruling Case Law, sec. 4, pp. 1103-75; Kent, Commentaries on American Law, II, 230-233.

He had to account for the income and profits of the land and protect it from waste and neglect. His responsibility for the land and the person of the ward were enforceable only by a suit brought by a 'next friend.'

Other classes of guardians known to the common law were guardians by nature, for nurture, by election of the infant, by prerogative of the royal family, by appointment of ecclesiastical courts, and—much later—chancery guardians. Statutory guardians were not known before 1660. Fathers were guardians by nature and this applied only to infant heirs and extended only to the person. Guardianship by nature continued until the ward reached twenty-one.¹ Guardianship for nurture extended only to the custody of the person of infants not heirs apparent and continued only to the age of fourteen. Only the father or the mother could exercise this guardianship.² The origin of guardianship by the election of the infant is obscure and it was probably later than the period now under discussion.³ Guardianship by the prerogative of the royal family apparently resulted from the authority of the king as parens patriae.⁴ Although little is known of the appointment of guardians by ecclesiastical courts, it probably applied to the personal estate which was treated entirely separately from real property.⁵ For completeness, guardians ad litem should be included. They had neither the custody of the person nor the management of the estate of the ward. The office developed in connection with infants' suits and it did not extend beyond the settlement of the particular litigation for which the appointment was made.

There were in England during the Middle Ages towns and boroughs outside the feudal territory which were governed by particular customs and which enjoyed special privileges.⁶ While

¹Blackstone, I, 379, sec. 461.

²Ibid.

³Hargrave in his notes to Coke upon Littleton, 88b.

⁴The king was, theoretically, the guardian of all the infants in the kingdom.

⁵Pollock and Maitland, II, 436-437.

⁶"These particular privileges are without doubt the remains of a multitude of local customs, out of which the common law, as it now stands was collected, first by King Alfred and afterwards by Edward the Confessor, each district sacrificing some of its own customs for uniformity. But for reasons that have now been long forgotten, particular counties, towns, manors, and lordships

the Norman Kings were more strongly establishing feudal organization over the rest of England, they granted charters to many of these boroughs permitting customs to continue which were said to have existed "since memory of man runneth not to the contrary." Townsfolk in many boroughs held their houses and lands at money rents instead of by services. Thus, the relationship of landlord and tenant was largely one of contract and not one of status. Sometimes freedom to transfer property was given to every burgess; sometimes he was permitted to make a will. These are notable contrasts with the feudal limitations on alienation of property by sale or will. Boroughs were in many respects self-governing districts and they might be said to have been more urban than rural in their characteristics.

Among other customs exercised by the boroughs was borough guardianship. Interesting early records of some of these boroughs reveal a very different picture of guardianship procedure from that related above. Although variations existed among them, they had, in general, the following provisions for the guardianship of minors.¹ Among other testamentary privileges enjoyed by borough citizens, every burgess could make a testamentary appointment for the guardianship of his heir's estate. If a father exercised this privilege, the testamentary guardian had the custody of his ward and the management of his estate until the ward reached full-age. If the father did not make a will, some municipal or borough authority took jurisdiction over wards and their estates. This public authority—mayor, jurats, bailiffs, or aldermen—appointed a guardian. The public authority when acting in this capacity was referred to as an Orphans Court. The court-appointed guardian was required to give sufficient surety that he would "keep and support the orphan, lands, tenements, and houses in their proper condition without waste, sale, or damage, during the time of his custody along with the surplus of expenses," under the supervision of the court. The court had full power and sometimes the duty to make a survey annually to see "that the custody is well and faithfully carried out to the advantage of the said orphans." The guardian was required to give an accounting of his administration. If necessary, his sureties were forced to make good any losses.

were very early indulged with the privilege of abiding by their own customs, in contradistinction to the rest of the nation." Blackstone, sec. III of Introduction, p. 42.

¹The discussion of borough guardianship customs is based largely on Borough Customs, Vols. I, II. Edited by the Selden Society.

In some instances these guardians could be discharged only in open and full court after final settlement had been made and the estate delivered to the ward. Thus is found in the early borough customs, testamentary guardianship, the appointment, and supervision of guardians by public local authorities. Borough customs were well in advance of the common law in time, in scope of control, and in providing administrative rules for guardianship.¹

When attention is turned again to feudal England, it is recalled that the feudal system had failed as a military organization and in the place of army services, fines, payments and other heavy burdens had been substituted. Between the 12th and 16th centuries the feudal system had changed from a military organization to a system of taxation. By the 16th century, it had broken down and had become gravely oppressive. During the previous hundred years the king had needed men to go with him in his wars "beyond the seas" and he had offered relief from burdens including those associated with wardships as an inducement. The Black Death placed a premium on the value of labor and lords found it increasingly difficult to keep their laboring tenants. Changes in agricultural and economic habits had a similar effect. Inequalities between rich and poor became greater. More and more laws were needed to enforce the harsh system and to prevent the avoidance of burdens by fraudulent conveyances, and the like. More and more wealth and control became centered at the top of the feudal pyramid. In 1540, the Statute of Wills² was enacted "for the relief of grievances." While this act allowed for the first time the disposition of real property by will, it was extremely limited. It was interpreted as applying only to land held in fee simple, not to life estates or other lesser estates. Most of the burdens including wardship and marriage of infant heirs was continued. Furthermore, one-third of the land willed reverted upon each transfer to the king or lord. In the same year an act was passed creating the Court of Wards and Liveries³ for the "governance of the king's wards and their estates." This Court was simply administrative machinery for the management of this source of the king's revenues. Further statutes had to be passed

¹Selden Society, Borough Customs, I, p. cxxxii.

²Statute of Wills, 32 Henry VIII, c. 1 (1540).

³Statute Creating Court of Wards and Liveries, 32 Henry VIII, c. 46 (1540).

during the reign of Elizabeth against fraudulent conveyances.¹ The Statute of Wills and the Court of Wards, by giving the king a better collection agency, had worked to deprive the landed gentry of the right to plunder infant heirs. On the succession of the Stuarts in the next century, the gentry sought to buy up the Crown Rights. The whole military system, however, had collapsed beyond repair.

During the Civil War in 1646,² both houses of Parliament passed a sweeping ordinance abolishing military tenures and all the feudal incidents connected with them. This ordinance was confirmed and enlarged in 1656.³ The Restoration Parliament could not recognize the validity of these ordinances but there seemed to have been no inclination to revive the feudal claims of the Crown. Among its first acts was the statute of 1660⁴ which abolished all tenures by knight's service of the king and all others and all the consequences of them. This act was made retroactive to 1645. Thus the Court of Wards and Liveries and the many incidents of military tenure including feudal wardships and marriages were abolished. All the estates held by military tenures were converted into estates held by "free and common socage." In the place of guardianship by right of tenure, the statute of 1660 substituted testamentary or statutory guardianship which had long been known in the boroughs. It gave the father absolute authority to dispose of the custody after his death of the person and the estate of his child until the age of twenty-one or a lesser time. Testamentary guardians were given the same authority and responsibility as socage guardians. Furthermore, they were given the custody and management of (the goods, chattels, and personal estate which authority socage guardians had not had. However, no provision was made for guaranteeing the administration of guardianships as trusts. Neither socage nor testamentary guardians were placed under the supervision of courts. No security was required in either form of guardianship. The only remedy the infant had was the one which he had always had at common law that of bringing suit by 'next friend' after waste or injustice had already been done.

¹Against Fraudulent deeds, gifts, alienations, 13 Eliz., c. 5 (1561-2); Against covenous and fraudulent conveyances, 27 Eliz., c. 4 (1585-6).

²Acts and Ordinances of the Commonwealth (1646), I, 883.

³Acts and Ordinances of the Commonwealth (1656), II, 1043.

⁴12 Charles II, c. 24 (1660).

After the important legislation of the 17th century, the changes in guardianship law for the next two centuries are found in judicial decisions, not in legislation. Much earlier, there had developed the equitable jurisdiction of the chancellor, "the keeper of the king's conscience," for meeting situations where adequate relief could not be had at common law. This grew to cover the management of estates of deceased persons, trusts, and, later, the management of guardianships of infants.¹ Chancery had long heard suits of infants and had, like other courts, appointed guardians ad litem to represent them. In 1696² Chancery for the first time appointed a guardian on petition without the filing of a suit or bill, and once taking jurisdiction of guardians and wards it was enlarged. Whether the authority came from the king as parens patriae or in another way, the position of Chancery was fully established by the 18th century. The development in chancery was in the direction of modifying the guardian's power, whether he be natural, testamentary, or socage. When disagreement arose or when the guardianship trust was abused, chancery appointed general guardians and made the infants wards in chancery. Gradually the position of the guardian as a holder of a trust in behalf of the infant became definitely established and the welfare and best interest of the child came to be the guiding principle in decisions. The father or natural guardian as well as legally constituted guardians came under the super-parental authority of chancery.

The children who came as wards under the protective arm of chancery were few in comparison with their total number. Only children with property could be made wards of chancery. Testamentary and socage guardians who did not come to the court administered their trusts at their own peril, and, need it be said, at the peril of the ward also. Not until 1827³ was the position of chancery with reference to children without means stated. In that year, Lord Eldon gave a decision supporting the view that the state has a super-parental power superior to the rights of the parent. In this case a father's right to the custody of his children was lost because his manner of life was inconsistent with their welfare. With reference to children without property this Chancellor said that it was not any want of jurisdiction which kept the court from acting out from a want of means to exercise

¹Jenks, Short History of English Law, p. 215.

²Case of Hampden (1696). See: 21 Cyclopedia of Law and Procedure, p. 18, note 48.

³Wellesley v. Duke of Beaufort, 2 Russel 1 (1827).

its jurisdiction over them. In explanation, he said that the court could not take on itself the maintenance of all the children in the kingdom. Thus came judicial recognition of the Crown's responsibility for all children.

Legislative modification of the father's position followed. Serjeant Talfourd's Act of 1839¹ provided that where infants under the age of seven were in the sole custody of control of the father, the Lord Chancellor or the Master of the Rolls might make an order that they be delivered to and remain in the custody of the mother until they attained the age of seven years. In 1873,² an act enabled chancery to transfer children below the age of sixteen from the father's to the mother's custody. The next step was the Guardianship of Infants Act of 1886³ by which the mother, on the death of the father, became guardian alone or jointly with such guardian as the father or mother shall appoint. This Act, for the first time, permitted the mother to make testamentary appointments. In 1891, the court was given further statutory authority over parents.⁴

The equitable jurisdiction over guardians and wards which had belonged exclusively to chancery was given to the other high court by the Judicature Act of 1873.⁵ The Guardianship of Infants Act of 1886⁶ conferred jurisdiction over guardians and wards on county courts, but as they had no facilities for handling these cases, the power was not made effective. Although the protection of the high courts was expensive and inaccessible to people with small means, the propriety of giving jurisdiction to courts of summary jurisdiction was seriously questioned. This authority had been kept most jealously in the highest court of the realm. Finally the Children's Act of 1908⁷ made it possible for courts of summary jurisdiction to act in cases involving dependent, neglected, and delinquent children but it was not applied to Guardians and Wards. Not until 1925⁸ was authority over Guardians and Wards granted to courts of summary jurisdiction with power to exercise it and then, perhaps wisely, with reservations.

¹2 and 3 Victoria, c. 54 (1839).

²36 and 37 Victoria, c. 12 (1873).

³49 and 50 Victoria, c. 27 (1886).

⁴54 and 55 Victoria, c. 3 (1891).

⁵36 and 37 Victoria, c. 66 (1873).

⁶49 and 50 Victoria, c. 27 (1886).

⁷8 Edward VII, c. 67 (1908).

⁸15 and 16 George V, c. 45 (1925).

The act provided that in any proceeding the court should regard the welfare of the infant as the first and paramount consideration, not being influenced by the common law right of the father or the claim of the mother. It gave the mother equal power to apply to the courts. It also provided for joint testamentary appointment.

In conclusion, it should be pointed out that English law at no time contained the principle that all children must have guardians. Testamentary appointment was permissive, not mandatory. The settlement of an estate on a minor was requisite to the assumption of guardianship by chancery. Most impressive in the history of guardianship in England is the shift of guardianship from a right--profitable to the guardian, burdensome to the ward--to a trust with the welfare of the infant as a guiding principle. The contrasting administrative rules and machinery for borough guardians and wards, should, however, be remembered. The emphasis placed on the child's welfare and on the trustee aspects of the relationship depend for realization on the actual administration of the law, however satisfactory the law may be.

In the American colonies, the development of the law of guardianship was simpler than in England. A great variety of classes of guardians are never found in this country. Although immigrants came from other countries than England, the laws on guardianship which carried through into the formation of the Union and influenced later developments, were generally those made by English settlers. The charters granted to the colonies usually contained a provision that the land be held "in free and common socage only, not in capite, nor by knight's service." After a colonial organization had evolved, many colonies passed laws providing that all lands and heritages should be free from all the incidents of feudal tenure, including wardships. Primogeniture was never the rule and, unless a will was made, property descended equally to the children. All the settlers were, in the political sense, free men and the laws passed applied universally. Both laws and records indicate a desire on the part of those who came to America to escape the burdens of feudal organization.

The earliest laws were made and administered by laymen. There were few lawyers and no trained judges before 1700.¹ The common law of England was accepted as a subsidiary system, but, in general, the colonists claimed to rely upon the laws of God wherever their own laws proved inadequate. One of the characteristics of early American law was its tendency toward codification. The settlers seemed to consider their codes a complete statement

¹Walsh, History of Anglo-American Law (2d ed.), p. 87.

of the necessary legal regulations, and matters not mentioned were left to the discretion of the magistrates. Ecclesiastical courts were rejected as inconsistent with the separation of Church and State. This necessitated new judicial arrangements for the distribution of personal property and other probate business. From the beginning in this country, the descent and probating and distribution of real and personal property were treated alike and were governed by the same laws and presided over by the same courts. These and other historical differences between the English and American backgrounds should be kept in mind in considering the development of guardianship law in America.

Very soon after their settlement, the original colonies created special courts for testamentary purposes, for the distribution of intestate estates, and for the care of orphans and their estates. In all the colonies these special courts were local in their jurisdiction and were given power to exercise equity as well as common law jurisdiction over matters coming before them. These special courts were called probate courts in Massachusetts, New Hampshire, Rhode Island and Connecticut. In Pennsylvania, New Jersey, Delaware, and Maryland, they were called orphans courts. The court of sessions had this jurisdiction in New York but when acting in this capacity was often referred to as the orphans court. Matters concerning orphans and their estates were assigned to county courts in Virginia, to precinct courts in North Carolina, and to county and precinct courts in South Carolina. The ordinary was in charge of them in Georgia. Apprenticeship was the usual method for providing care for orphans and other minors without means of their own. Masters and apprentices were frequently placed under the same jurisdiction as guardians and wards. The colonies did not copy the English pattern which placed equity jurisdiction over all matters including the guardianship of minors in one high court entrusted with the conscience of the sovereign. During the 18th century, chancery courts developed to some extent in the colonies, and during the next century, to a considerable extent throughout the United States. They were given power to adjudicate matters pertaining to guardianship, but this later development never replaced the jurisdiction of the local courts over guardians and wards.

One of the earliest laws passed in the several colonies was one enacted in Massachusetts Colony in 1641.¹ It provided that the age for passing away lands and hereditaments or giving

¹Colonial Laws of Massachusetts, 1672, p. 1.

of votes and verdicts in civil actions should be twenty-one, but for choosing guardians, fourteen. A similar statute was enacted in Connecticut in 1650,¹ and the same provision was made later in the early laws of New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, and probably in Delaware. The special courts having jurisdiction over orphans and their estates were authorized to "allow of guardians that shall be chosen by minors over fourteen, and to appoint guardians for such as be within that age."² These courts were early directed to require an inventory of the minor's estate, security for the faithful performance of the guardian's trust, and accountings of the administration of the ward's estate whenever the court saw fit or complaint was made. The courts were empowered to remove guardians and appoint new ones. Colonial laws and records show that the local courts had, almost from their creation, the same authority with reference to guardianship that they now enjoy.

The statutes not only gave the court the authority but they also implied the duty to participate actively in seeing that wards and their estates were protected. For example, a New York act of 1665 which was re-enacted in 1684³ provided that: "all persons having any estates in their possession belonging to persons under age shall once every year exhibit an inventory and account to the court of sessions in the jurisdiction where the estate lyeth, and if they fail, to be sued for such neglect, and if no good improvement has been made on the estate it shall be in the power of the court to compel them to give further security for better improvement and management or otherwise to remove it into the hands of other persons as the court thinks meet and convenient." The acceptance of the responsibility of guardianship was made almost obligatory in Pennsylvania in 1683,⁴ and later in Delaware⁵ and elsewhere it was looked upon as a public duty. These two states enacted that ". . . if a man shall refuse this honest care and charge in the government, unless he hath five children

¹Connecticut Code of 1650, pp. 20, 21.

²Ancient Charters and Laws of Massachusetts Bay, Province Laws (1693), chap. xvi, sec. 2, p. 253.

³"Duke of York's Laws repassed in 1684," Laws of the Colony of New York, 1664-1719, chap. xv.

⁴"Laws of 1683," Charter and Laws of the Province of Pennsylvania, 1682-1700, p. 142; found again in ibid., "Laws of 1696," p. 266.

⁵Delaware Laws, 1700-1776, Appendix, p. 18, sec. 188.

to take care of, or is already executor to one will, or hath persons nearer related to him who in all likelihood will impose that charge upon him, he shall be fined. . . ."

Another illustration of the general responsibility for orphans is found in a North Carolina law¹ which charged the grand jury of every county with presenting in writing at the annual meeting of the orphans court the names of all unapprenticed orphans without guardians and all abuse and neglect of orphans in the county. Similar laws are found in other colonies. The treatment of guardianship as a trust to be administered under the supervision of the court is in conspicuous contrast to English guardianship of the 17th and 18th centuries.

Some of the colonies saw fit to have judges, a chancellor, or a committee appointed by the legislature compile the English statutes that were in force. In 1712, the common law of England was adopted by South Carolina as the law of the colony and a list of English statutes was approved except where found inconsistent with the customs and laws of the province. North Carolina did so in 1715; other states soon followed.² Among the statutes listed which concern guardians and wards were usually included in the following: The Authority and Duty of Guardians in Socage,³ Statutes of Waste,⁴ The Act and Uses of Wills,⁵ The Statute of Wills,⁶ and the statutes which abolished military tenures and created testamentary guardianship.⁷ After the Revolution, the original states included in their first constitutions such statements as "the common law of England as well as so much of the statute law, as have been heretofore practical in this colony, shall still remain in force until altered by future laws of the legislature."⁸ The Virginia Constitutional Convention in 1776⁹ adopted the common law "prior to 4 James I," or 1606, and Illinois

¹Acts of 1762, 23 State Records, Laws, 1715-1776, chap.69.

²Walsh, op. cit., p. 89.

³53 Henry III, c. 16 (1267).

⁴3 Edward I, c. 21 (1275).

⁵27 Henry VIII, c. 10 (1535).

⁶32 Henry VIII, c. 1 (1540), and 34 and 35 Henry VIII, c. 8 (1542-1543).

⁷4 and 5 Ph. and Mary, c. 8 (1557); 12 Charles II, c. 24, secs. 8, 9, and sometimes 10 (1660).

⁸Constitution of New Jersey (1776); Compiled Statutes of New Jersey (1709-1910), I, p. xxix.

⁹Virginia, Ordinances of the Convention, 1776.

and Kentucky have followed this Virginia statement.¹ It is difficult to determine the significance of these statements with respect to guardianship because by 1776 or shortly thereafter these states had compiled their laws on Guardians and Wards into one comprehensive act and these acts were rather complete statements of the law of guardianship.

In general, when the colonies and later the states enacted testamentary guardianship statutes, they copied verbatim the English statute of 1660.² There are a few colonial records of testamentary appointment of guardians even before 1660. The English statute was listed among those in force in those colonies which adopted digests of English Statutes in Force, and there is evidence that whether or not testamentary appointment was customary, the wishes of the deceased parents were taken into consideration by the courts when appointing guardians. Some states made statutory provision for testamentary guardianship early in their colonial history, for example, Virginia in 1730.³ A Pennsylvania Province law of 1682⁴ implied that testamentary guardianship was customary when it stated "when under this government there shall or may be an infant under the age of twenty-one, and no guardians or commissioners are appointed in writing by the father, or such appointed ones are deceased during their minority" guardians are to be appointed. In 1721,⁵ Delaware enacted that the court in appointing guardians should respect wishes expressed in wills and testaments, and in 1893,⁶ this state copied the sections of the English Statute of 1660. Other commonwealths did not make statutory provisions for this form of guardianship until many years after they had become states. The laws as well as the decisions show that all guardians, whether testamentary or court appointed, were very early brought under the superior authority and supervision of the courts. Parents and testamentary guardians were required to give bond and security and made as fully subject to the supervision of the court as any other guardians.

¹Walsh, op. cit., p. 96.

²12 Charles II, c. 24, secs. 8 and 9.

³Virginia, Henning's Statutes at Large (1711-1738), IV, chap. viii of Acts of 1730.

⁴Charter and Laws of the Province of Penn. (1682-1700), sec. 21, p. 98 of The Frame of the Government by William Penn.

⁵Delaware Laws (1700-1776), Laws of 1721, chap. iia.

⁶Delaware Laws (1777-1797), II, Laws passed 1793, chap. viii, sec. 4, p. 1070.

English statutes relating to guardians in socage were among those adopted as in force in some of the colonies. The land of the first twelve colonies was said to be held in "free and common socage" according to the charters granted to the colonies by the king. Yet, the term "socage guardianship" is almost never found in colonial or later guardianship laws or decisions. It is impossible to judge whether the absence of the term "socage" signified its very general acceptance or its absence. New York, New Jersey, and North Carolina still use the term but in a different meaning from the one it had in England. It is mentioned once in the Virginia Statutes.¹ It was denied in a Pennsylvania case in 1785,² although the petitioner claimed the right to guardianship because of the socage relationship. The term is never mentioned in the laws of the other colonies.

From time to time the several colonies passed additional laws relating to Guardians and Wards. The added legislative provisions related to administrative details, such as defining the time allowed for the return of inventory, the intervals between periodical accountings, the causes for the removal of guardians, compensation, those to be preferred in appointing guardians, etc. By the end of the colonial period, each colony had provisions for the guardianship of minors which correspond in most respects to those on the statute books today. Many of the colonies had reduced these laws into one chapter entitled Guardians and Wards, Orphans and their Estates, etc. An Act Respecting Guardians of Rhode Island³ is an illustration of the comprehensiveness of guardianship law. It authorized the court of probate to appoint guardians, to take bond with sufficient security, and to call them to account when the minor reached twenty-one, or at any time the court thought necessary. If a minor was outside the state or neglected to come or the guardian chosen did not give security, the court was authorized to appoint one for minors over fourteen as well as under that age. The court was enabled to discharge guardians and appoint others. The guardian's duties were: "to give suitable care to the person, to improve the estate frugally and without waste, to apply the income and profits to support and maintenance of the ward, to sue and be sued, and to make sales with a Supreme Judicial order when necessary." This Act included testamentary guardianship and placed the testamentary guardianship

¹Virginia, Revised Code of Laws (1819), chap. 108, sec. 4.

²Graham's Appeal, 1 Dallas Reports 147 (1785).

³Act Respecting Guardians, sec. 1-6, Public Laws of Rhode Island (1798).

under the supervision of the court. It also provided for the compensation of guardians. Few changes have been made since that time.

During the colonial period there was a change evidenced in the laws relating to Guardians and Wards in the attitude toward the sale of real estate. Without exception, the first laws of these original states forbade the sale of real estate and provided that when the interest and profits of the estate were insufficient, the laws of apprenticeship should operate. A Virginia law is typical:¹

"No account shall be allowed on orphans estates, but they are to be educated upon the interest of the estate, if it will bear it, according to the proportion of the estate. But if the estate be so mean and inconsiderable that it will not reach to a free education then the orphans shall be bound out to some manual trade until twenty-one, except some friends or relations be willing to keep them, with the increase of the small estate, without diminution of principal, which, whether great or small must always be returned to orphans at the years appointed by law."

About the turn of the 18th century, the sale of real estate is permitted with the approbation of the court and this has continued to be the rule. The sanctity of real property diminished as the mobility of the new country's population became apparent and this was made evident by the changed attitude toward the sale of real property. It should be noted, however, that the sale of real estate is still most carefully guarded.

Upon the Revolution, it would seem that the various state governments succeeded to the rights of the sovereign and consequently, a tenure relation existed between the owner of the land and the state in the character of the sovereign.² In the United States, the sovereign state, as in England the king, is recognized as the ultimate parent of all children and has from colonial times exercised authority and some degree of responsibility towards them. Here, as in England, this power is closely associated with the equitable powers of chancery. In it has been found the authority for the recent juvenile court movement and other socialized legislation in behalf of children. It should not be overlooked, however, that courts of local jurisdiction--probate, orphans, or

¹Acts of 1656, II, secs. 1-6, Virginia, Henning's Statutes at Large, 1619-1660, Vol. I.

²Bigelow, Introduction to the History of Real Property, pp. 17, 18.

county—have from the beginning had the authority and responsibility for the guardianship of minors in this country.

In brief, it may be said that the laws of the original states show that early provisions were made for the care of orphans and their estates. The guardianship of the person and the management of the personal and real property has been under the jurisdiction of special courts. Testamentary guardianship was gradually written into the statutes, except in Iowa where it has never been enacted, but where the judges are invoked to take cognizance of parental wishes, expressed or implied.¹ By the 19th century, most of the states had brought their laws on Guardian and Ward together under one act or in one chapter which covered the matter comprehensively.

As the summary of the present laws on the guardianship of minors presented in the following chapters will show, the only changes in guardianship laws for more than a century have been to recognize the rights of the mother in her children, to restrict the father's power of testamentary appointment, and to remove the disabilities for guardianship under which married women had suffered. The power of testamentary appointment has been extended to the mother when she is sole survivor and in some states, to her during the life of her husband with his consent. In other states, a father cannot make a testamentary appointment during the life of his wife without her consent. Some states made these changes during the decades between 1830 and 1850. Others did so around the '70's, about the same time this power was extended to women in England. Some did not do so until very recently. During the past century, there has been a growing tendency to remove the disabilities of married women and this tendency is clearly shown in the present competency of married women for the office of guardian of their own and other children. In contrast with marriage ipso facto terminating a woman's guardianship, many states now affirmatively enable, by statute, the married women to serve in this capacity. Other states have not done so by statute but simply make no distinction between men and women, married or single. The former limitations because of marriage or remarriage by the mother after her husband's death are removed.

Throughout the history of guardianship, the welfare of the child has been more and more clearly perceived to be the paramount issue. While the law has enlarged the mother's rights, the rights of both parents are subordinate to the best interests of the child. The authority of the state now overshadows the natural rights of

¹In re O'Connell, 102 Iowa 355 (1897).

parents, and the duty of the state becomes more evident in both law and social practice. But, like England, the United States have not provided for the guardianship of all children who are without natural guardians. Here, as there, unless there is property involved minors are likely to be without a legally constituted guardian if orphaned. Furthermore, no administrative procedures have been added to these local courts for the purpose of seeing that the intention of the laws is accomplished.

In the following chapters an attempt will be made to present a summary of the legislation in the various states dealing with the subject of Guardian and Ward together with a few judicial decisions and the social interpretation. It will appear that there is great similarity in the laws of all the states. At the same time, there are differences which are brought out in such a review. An opportunity is offered, too, to consider the merits of the individual variations and to ask whether or not they outweigh the greater convenience which might result from uniformity among the states. The summary may indicate where some or all of the laws are inadequate to insure the performance of this most delicate and important duty of the state as parens patriae.

The statutes are summarized with reference to the following topics: the kinds of guardians; the duties of the guardian toward the person and the estate of the ward; jurisdiction and procedure; accounting and final settlement; the compensation of guardians; and the termination of guardianship.

The first section of the summary is devoted to the kinds of guardians. The various kinds no longer signify great differences in authority and function. Some of the kinds of guardians have already been named and characterized in the historical discussion. The importance of the several kinds of guardianship has been greatly reduced or has disappeared entirely. The varieties indicate the ways in which the office of guardian is created rather than differences in the rights and responsibilities of the offices once it is created. Today the laws governing guardians, apply, in general, to all kinds of guardians, however they may have been appointed.

Natural guardianship which concerns the private legal relationship of Parent and Child has, of course, always had separate treatment. Here it is briefly touched upon because the discussion of statutory guardianship always includes it as a form of guardianship. It is, moreover, a pattern for the guardian of the person in other forms of guardianship. Natural guardians, when not appointed to the office of guardian of the estate, cooperate with the latter guardian. The parent or natural guardian, like the guardians of the person, has the custody of the child. His

authority is also subject to some supervision and regulation. It has been modified in its extent and nature by statute and judicial decision, as has been pointed out in the historical discussion. The father's authority, which was formerly almost absolute, is now shared by the mother, and both parents have been brought under the superparental power of the state. This power is exercised with a view to determining and furthering the best interests of the child.

The authority of the natural guardian extends beyond his life in the respect which the law gives to his nomination of a testamentary guardian. Testamentary guardians, which were long known to borough custom and which were introduced into English statute law in 1660, are recognized throughout the United States. The appointment of the testamentary guardian is an arbitrary act on the testator's part but court action makes it a matter of official record. The power of creating a guardian by a last will and testament has been extended to the mother. The authority and functions of the testamentary guardian have been modified and directed by laws governing all guardians. Unless excused by will, the testamentary guardian is required to give bond. Once a testamentary guardian has been appointed, he is thereafter subject to the laws affecting guardians in general and is in almost no way distinguishable from them.

The remaining classes of guardians are appointed by a court. The great majority of guardians are in fact today appointed by the court. Once so appointed, the status of these guardians is the same, whatever title they may bear. The appointment procedure differs in that, generally speaking, minors over fourteen may nominate guardians of their own choice, subject to the approval of the court. Guardians are appointed by the court for minors under fourteen and for those over fourteen who fail to make a choice, and the appointment takes into consideration the preferences listed in the statutes. Socage guardianship which formerly descended upon the nearest kin who could not inherit, has become merely an inconvenient and misleading term for guardianship under court appointment. Guardians appointed under the Uniform Veterans' Guardianship Act are court appointed in every sense except that the court has the recommendation of the Veterans' Administration. Guardians ad litem are included in the summary of the statutes only for completeness, since they can be appointed by any court and serve only in a particular litigation to which an infant is party. In the general treatment of guardianship, the office of guardian ad litem is, however, significant to this extent. Guardians ad litem are sometimes appointed to represent a ward's interests when his guardian petitions to sell real estate or is rendering an account to the court. In the following summary, the

provisions affecting Guardian and Ward do not apply to guardians ad litem. Like guardians ad litem, public guardians are not to be grouped with the ordinary classes of guardians appointed by the court. Ten states have created the office of public guardian to perform guardianship functions when no other guardian is available. It should be pointed out again that the distinctions in the kinds of guardians are not so significant in themselves. All kinds perform the same functions and are subject to the same laws. In the summary as in the statutes, the statements refer to all types of guardians other than natural guardians, guardians ad litem, and public guardians.

The tabulation of the courts having jurisdiction is given largely as a matter of information. Although the court having jurisdiction over Guardians and Wards may bear various names from state to state, its jurisdiction over them is essentially the same everywhere. The tabulation does, however, indicate certain problems in the overlapping of authority in regard to Guardians and Wards.

The remainder of the summary deals with the appointment procedure, the authority and duty of the guardian with reference both to the person and to the estate of his ward, and the termination of the guardian's office. The details and the minor variations in the statutes may be somewhat confusing, and the significant characteristics of the relationship may at times be difficult to perceive.

In this maze of regulations and requirements, certain general things should be said to guide the reader. In the main, the provisions are similar in all the states, and the variations are relatively unimportant. Guardians are appointed on petition to the court having jurisdiction. The petition may be brought by any interested person. All interested persons including particularly the person having custody of the minor and the minor himself, if he is over fourteen, are given notice to appear at a hearing. A few states provide by statute for temporary arrangements pending the final appointment of a guardian. When it seems necessary and convenient, the court will appoint the petitioner, if he appears to be a suitable person and can give bond with the required sureties. If more than one person seeks the guardianship, the paramount interests of the child are the statutory guide for the court in making appointment. At the hearing, any interested person is given opportunity to present objections to the petitioner's appointment. By reason of office, certain persons are excluded by statute in some states from serving as guardians. If the minor has a natural guardian, that guardian or another person may be appointed guardian of the estate. When there is need for a

guardian of the person as well as a guardian of the estate, the same person is often appointed in both capacities. In the summary as well as in the statutes, the term "guardian" implies both the guardian of the person and of the estate, unless the term is specifically limited to one or the other function. Bond must be made before the letters of guardianship are issued. Within a period of time, either one fixed in the statute or one left to the discretion of the court, an accounting of the estate must be returned and filed with the clerk of the court. The time allowed is usually three months. Statutory directions for the appraisal of the estate are found in only a few states.

In its very nature, the relationship of Guardian and Ward is primarily dependent upon the person filling the office of guardian. The more important factors of the relationship do not and cannot lend themselves to specific statutory directions. For this reason, the appointment of a guardian is perhaps the most responsible obligation resting on the court in the administration of the law of Guardian and Ward. While the law cannot define the characteristics of a guardian, it could provide local courts with such administrative facilities as would ensure the careful selection of guardians. In the summary which follows the lack of such facilities is apparent.

Guardianship of the person is treated only briefly in the law. Like a parent, the guardian of the person has custody of his ward or is responsible for the ward. He guides and directs the education of the child. Although he is responsible for seeing that the child is properly cared for, he is not liable for doing so at his own expense. The necessary outlay is met from the income of the child's estate, and the standard of living which the child is able to maintain will therefore depend upon the value of the estate. The guardian of the person cannot be presumed to have the child's interest as closely at heart as the parent. Yet the statutes provide for no supervision of the relationship and the courts become aware of abuses only when complaint is brought. Here again the laws cannot provide for the individual child, but the courts could be required to give some active supervision to the personal relationship. Since the statutes contain no such provisions, the summary makes no mention of them.

In the statutes, the management of the estate receives more detailed attention than any other matter in connection with guardianship. General directions are given for the investment of money, and penalties are fixed for negligence in making investments. Directions for leasing and mortgaging real estate are given. Mortgaging of real estate is too frequently included with its sale, and the provisions of the statutes as given in the

summary may therefore be confusing. Real estate cannot be sold without the permission of the court, and the law surrounds such sales with many cautionary measures.

Periodical accounting or settlement with the court is required of guardians of the estate. The interval between such settlements varies from one to three years. In a few states, a settlement is required only when the court demands it. This occasion provides an opportunity for the court to look into the condition of the estate, offer effective guidance to the guardian, and uncover errors, frauds, and abuses. The extent to which the settlement is utilized constructively cannot be learned from the statutes, and the summary makes no attempt to go beyond the statutes in describing the legal practice of guardianship. Since there is no authority to supervise the local court, there is also no authority to determine the care with which the accounts of guardians are examined, corrected, and utilized for the benefit of Guardians and Wards.

A variety of provisions for the final settlement of guardianship is found in the statutes. All too few states require formal settlement of the account and discharge of the guardian by the court. In many states, the guardians are permitted to settle with the ward and be released by him. Provisions for final settlement are indefinite. Compensation of the guardian is included in the statutory provisions touching the management of the estate. Termination of guardianship may result from majority, marriage of the ward, resignation of the guardian, or the removal of the guardian. A guardian may be replaced by another of the ward's own choosing after the ward reaches fourteen years of age.

It should be borne in mind that the following summary of the statutes referring to Guardians and Wards is intended to give the legal provisions governing this relationship. It makes some criticism and suggestions. It cannot provide a survey of the actual conditions prevailing in the administration of guardianship in the several states.

CHAPTER III

KINDS OF GUARDIANS

Natural Guardians

Parents are the natural guardians of their children. Natural guardianship extends only to the person of the child, and the parent, as such, has no power over the real or personal property belonging to the child. To assume any control of the property of a child, a parent must be appointed guardian by a court. The following discussion of natural guardianship deals solely with guardianship of the person. Although this study is not concerned with the relation of Parent and Child, it will attempt to present the aspects of that relationship which are significant in guardianship. An understanding of the relation of Parent and Child is fundamental in an analysis of guardianship of the person. The fundamental principle of social case work as well as the traditions of society operate to preserve the family unit because that unit is believed to be best suited for the growth and development of the child. Other kinds of guardians are valuable in the degree to which they create a relationship like that of Parent and Child. The administration of the law of guardianship needs those services which will make the substitute relationship of Guardian and Ward most nearly like that of Parent and Child. Social services which are designed to accomplish the adjustment of the members of the family to each other and of the family to the community can assist the guardian and the child in their legally created relationship and give the child as nearly as possible the influences which might have been expected in his own home.

Although the patria potestas of Roman Law was never wholly accepted in England,¹ the power of the father, during the minority of his children, was almost absolute until the last few centuries. There has been a gradual but continuous modification of this large paternal authority. The position of the father was probably never so strong in the United States as it was in England, but here too it has been necessary to modify it in behalf of the mother,² and as will be seen, the law has been modified in behalf of the child,

¹Pollack and Maitland, II, 437.

²See p. 25.

of other persons giving care to the child, and of the state.

In thirty-nine states laws had in 1930 been passed to the effect that the mother shall enjoy equal rights with the father in the guardianship of their children, during their joint lives. Some of these states, nevertheless, place greater limitations on her parental authority than on that of the father. The statutes establishing "joint guardianship" of parents and giving them "equal" rights are relatively recent. A large number of them have been passed during the last decade. Yet, in nine states the father is still the sole guardian unless declared incompetent by judicial action. In Alabama, Georgia, Kentucky, Louisiana, North Carolina, Oklahoma, Texas, and Vermont, the guardianship comes to the mother only upon the death of the father or by his abandonment of the child. In every state, either parent surviving the other is the sole natural guardian. The mother is the guardian of her "natural" or illegitimate child. With this modification in behalf of the mother's guardianship rights, the common law rule that the mother was under no legal obligation to support her minor children has also been modified by statute.

Only the father, mother, or both of them can be natural guardians of their children. Natural guardianship does not devolve upon grandparents, or upon other relatives. A few opinions which have been handed down have apparently used the term "natural guardian" carelessly. For instance, in an Iowa Case where both parents and grandfathers were dead and the maternal grandmother made no claim to the custody of the children, the paternal grandmother, who had their actual custody was referred to as their natural guardian.¹ Better doctrine, however, was expressed in a case² where a grandmother with whom a minor lived and to whom she turned over her earnings with the understanding that the grandmother was to account for the balance after providing food, clothing and shelter, but who was not her legally appointed guardian, was held to be a quasi-guardian, or guardian de son tort.

In case of the separation or divorce of the parents, the welfare of the child is supposed to guide the assignment of the custody of the children; neither parent having an absolute preference over the other. The court is somewhat inclined to award the custody to the innocent party. Some states suggest that, in general, children of tender age be given to the mother and children of the age for education and training for business to the father, while others suggest an assignment on the basis of sex. The

¹In re Waite, 190 Iowa 182 (1920).

²Stetina v. Bergstein, 204 Mo. App. 366 (1920).

welfare of the child should of course be the primary consideration. The assignment of custody to either parent does not completely eliminate the guardianship rights of the other nor the obligation to support. Where a wife had obtained a total divorce and the custody of the children because of the misconduct of her husband and had raised no question of support at that time, a court held several years later that she was entitled to recover expenditures for necessities during the interim since the divorce.¹ A decree of divorce against the father and the award of a child to the mother was said not to be an insuperable objection to his appointment as guardian in case of the death of the mother in a case where the father had failed to support, had failed to provide medical care, and had thrice denied the paternity of the child.² His petition was denied on the grounds of his neglect, not because the child had been awarded to the mother at the time of the divorce. The decision in favor of the assignment of guardianship to the aunt in this case rested upon the fact that the father was considered unfit and that the aunt had given care and was a competent and suitable person. The mother's dying wish that the aunt rear the child also influenced the court in this case. The many legal and practical difficulties which arise in such cases show clearly the need for social case work in the first assignment of custody and in making new decisions when circumstances change. Fortunately, the dangers of dividing the time and allegiance of children are more and more clearly recognized in both law and social work.

Similar questions with reference to the natural rights of parents arise when either or both parents have, through necessity, convenience, or indifference, left their children in the care of another and wish to regain them after a period of time. A father may have remarried and may now have a suitable home. His financial condition may be improved. What claims to guardianship has he against a foster parent who has given care and support sufficient to develop emotional ties and for the child to adjust to new family and community relationships? The writ of habeas corpus is the remedy given parents for regaining custody of children and wards. Upon this proceeding, adjudication is not final but may be reviewed again and again. The factors to be considered in this proceeding include the natural right of parents, the agreement between the parent and stranger, the fitness and ability of each, perhaps the willingness of the foster parent to adopt the child,

¹Brown v. Brown, 132 Ga. 712 (1909).

²In re Byran, 48 Nev. 352 (1925).

the child's own wishes, and, most of all, the welfare of the child. How long should a parent be permitted to ignore his parental responsibility without forfeiting parental rights? The presumption that the best interests of an infant will be subserved by awarding him to his natural parent is rebuttable; the welfare of the child being the ultimate issue. "The child's welfare takes precedence over the parent's right to custody, but the child's welfare must be seriously threatened to justify refusal to award the custody to the father."¹ The judge made this statement in a case where the court upheld the finding of the lower court in denying the petition of a father for the custody of his child. In this case the father had been placed on probation and had been told to leave the state for ten years for issuing fictitious checks. The next year the child was returned to the state at the request of the father, and placed in the care of his second wife. Shortly afterwards, because of neglect, the child was taken, made a ward of the juvenile court, and placed in the custody of her maternal grandparents. The father sought to recover her custody. Regardless of his parental rights, his petition was, however, denied. In another case,² it was said that the court's consideration for parents should not influence it as regards custody where it would clearly not be for the best interests of the child. In a case³ where a divorced father sought to regain his children after the death of his wife, the court said that as a general rule, a parent is entitled to the custody of his or her children as against all the world. But this rule does not obtain where the parent has transferred or abandoned custody to another and it does not appear that the welfare of the children requires that their custody be reinstated in the parent. In this case a young mother had returned to her own mother with her two infants. Her former husband visited the children and was welcomed in the home. The mother died and the father remarried. The grandmother permitted them to visit their father for several weeks. He sought to make it permanent. She took them back in his absence. He obtained a warrant on the complaint of kidnapping and regained them. She petitioned for their guardianship and custody. The circumstances which the court considered were the youth of the step-mother, the bad financial condition of the father, his lack of a home, the fact that he had been in arrears in his payments for their support.

¹In re Guardianship of Marmaduke, 130 Cal. 449 (1933).

²Barnard v. Barnard, 157 Md. 264 (1929).

³State v. Williams, 107 W. Va. 450 (1929).

Both father and grandmother were considered suitable and interested in the children. The court felt that the circumstances strongly indicated that the custody was committed not only by the mother but also by the father to the grandmother and their custody was awarded to her by the court. It is difficult to predict, in cases of this sort, which party will be favored by the decision. There is considerable opinion on both sides. The weight of opinion, however, seems to be away from the claims of parents and toward the equities in the case and the best interests of the child. A few states prescribe by statute that if a parent abandon a child in a state or charitable institution for more than a year, the right to custody and the right to give in adoption are lost to the parent and become vested in the superintendent or secretary of the institution. Between parents and strangers, there is no statutory law relating to time and terms of agreements.

The acknowledgement of child welfare as a state responsibility, although relatively new, now colors the concept of natural rights of parents in their children and renders less important any contest between parents over this matter. The prerogative of the state as parens patriae to determine the proper custody of children is definitely established. This authority has been, in part, delegated to juvenile courts. By statute, these courts have the power to award the custody of dependent, neglected, and delinquent children to such persons or institutions as the court deems proper and this power may be invoked not only by officers of the court but also by interested persons. In this legislation there appears an extraordinarily elastic jurisdictional power over children found in circumstances which classify them as dependent, neglected or delinquent. The liberal legislation enables the juvenile court to give protection to such children without indicting or convicting the parents. Other interferences with the natural rights of parents are seen in child labor and compulsory education laws. In all regards, the position of the state as parens patriae is increasingly stronger. These modifications of parental authority in behalf of the child are equally applicable to legally appointed guardians.

Testamentary Guardians

Testamentary guardianship, created in England in 1660,¹ provided that the father might "by deed executed in his lifetime, or by his last will and testament in writing" dispose of the

¹12 Charles II, c. 24 (1660).

custody of his minor children, and that this disposition should "be good and effective against all and every person claiming the custody and tuition of such children." This law was interpreted as giving the guardian authority even against the widowed mother.¹ This power was confined to the father and he could exercise it even if he himself were a minor. Testamentary guardianship, resting either upon the English statute or local provisions, has been enacted in the United States with the exception of Iowa.² A number of states now omit the clause "by deed," and many states have restricted the power to persons competent to make a will, that is, those who have attained majority. In all the states, an appointment by last will and testament supercedes one made by deed.³ Testamentary guardianship has been modified to restrict the unlimited power of the father, in order to give testamentary power to the mother, and to bring testamentary guardians under the authority and supervision of the courts.

Like other forms of guardianship, testamentary guardianship is an office of personal trust and therefore cannot be assigned, that is, delegated or willed to another. Testamentary authority can issue only from the testator. According to the provisions of the will, the appointment carries guardianship of the person or of the property or both and continues during the minority of the child or a shorter time. In no instance can an appointment be made by a grandparent, uncle, aunt, or other relative.

Instead of the power to appoint guardians by deed or will being limited to the father alone, it is now extended in every state to some degree to the mother. One general modification is found in the fact that the mother may make a testamentary appointment if the father is dead or incapable and has not exercised this power. With one exception and this one is being modified, the

¹Kent, Commentaries on American Law (Holmes ed.) II, chap. xxx, p. 225.

²"But the express wishes of the parent, especially when made shortly before death, will have influence with the court and will determine the appointment, if other things are equal." In re O'Connell, 102 Iowa 355, 71 N. W. 211 (1897); In re Johnson, 87 Iowa 130, 52 N. W. 69 (1893).

³Woerner, American Law of Guardianship, p. 57, lists Alabama, Arkansas, Connecticut, Georgia, Illinois, Michigan, Minnesota, Missouri, Nebraska, Nevada, Ohio, Oregon, Rhode Island, Pennsylvania, Vermont, Virginia, West Virginia, and Wisconsin as limiting the power to being exercised "by will" only.

father cannot, by his will, deprive the mother of the custody of her children during her lifetime. Some states are clear in their statutory directions for the appointment of testamentary guardians; others are not clear. Testamentary guardians are not provided for by statute in Iowa at all.

The largest number of states limit the power of appointing testamentary guardians to the surviving parent, or to either, if the other has abandoned the home, or is incompetent. These states are Arkansas,¹ Colorado,² Connecticut,³ Kansas,⁴ Kentucky,⁵ Louisiana,⁶ Maryland,⁷ Michigan,⁸ Mississippi,⁹ Missouri,¹⁰ Montana,¹¹ Nebraska,¹² Nevada,¹³ New Hampshire,¹⁴ New York,¹⁵ Ohio,¹⁶ Pennsylvania,¹⁷ Texas,¹⁸ Washington,¹⁹ and Wyoming.²⁰ Mississippi expresses her statutory provision by limiting the appointment to be for fatherless and motherless unmarried children. Pennsylvania adds to the provision that sole surviving parents may appoint testamentary guardians the following:

"The testamentary guardian is not to be entitled to the custody of the person unless the mother, if surviving, relinquishes the custody. Either parent may by will appoint a testamentary guardian for the estate, either real or personal, which he or she leaves to the child, whether or not the other parent is living."

¹Acts of Arkansas, 1921, No. 257, sec. 2.

²Secs. 5542, 5543. [Compiled Statutes listed on p. 179]

³Secs. 4802, 4869.

⁴Chap. 38, sec. 202.

⁵Sec. 2016.

⁶Sec. 257.

⁷Laws of Maryland, 1929, chap. 561, p. 1, 363 subtitle 4.

⁸Sec. 15772.

⁹Sec. 1866.

¹⁰Sec. 380.

¹¹Sec. 5834

¹²Chap. 38, sec. 112.

¹³Sec. 9499; Statutes of Nevada, 1923, chap. 4, p. 3.

¹⁴Chap. 290, sec. 4.

¹⁵Chap. 14, sec. 81.

¹⁶Sec. 10930.

¹⁷Laws of Pennsylvania, 1925, No. 372, p. 689, sec. 1a.

¹⁸Sec. 4419.

¹⁹Sec. 1580.

²⁰Sec. 7015.

This obviously confuses the provisions. Whether the first provision which says that the sole surviving parent may appoint is limiting or simply permissive is difficult to say. To this group should possibly be added South Carolina¹ which provides that the surviving parent may appoint by deed or will and then adds that if both parents are living such a deed is not valid unless signed by both father and mother.

With the written consent of the mother, the father may by will appoint guardians for the person or the estate or both in Arizona,² Idaho,³ North Carolina,⁴ North Dakota,⁵ Oklahoma,⁶ South Dakota,⁷ and Utah.⁸ Either parent with the written consent of the other may nominate by will a testamentary guardian in California,⁹ Minnesota,¹⁰ and New Jersey.¹¹ A special privy examination is required in North Carolina to protect the mother from undue influence. In Florida¹² and Tennessee¹³ parents may appoint by deed or will executed jointly.

A number of states have modified the testamentary authority of the father in the following way: Every father and mother, or either, provided the appointment shall not take effect to deprive the other parent during his or her lifetime of the custody, unless the surviving parent should consent or is shown to be unfit, may appoint a guardian. This is the case in Alabama,¹⁴ Illinois,¹⁵

¹Sec. 5563.

²Sec. 4116.

³Sec. 7853.

⁴Sec. 2151.

⁵Sec. 4456.

⁶Sec. 6579.

⁷Sec. 217 (Laws of 1919).

⁸Sec. 7799.

⁹Statutes and Amends. to the Codes of California (1925), chap. 431, p. 941.

¹⁰Sec. 8933.

¹¹New Jersey, Laws of 1928, chap. 6, p. 16.

¹²Sec. 5884.

¹³Sec. 8474.

¹⁴Sec. 8097.

¹⁵Chap. 64, sec. 5.

Indiana,¹ New Mexico,² and Virginia.³ Rhode Island⁴ should probably be included in this group of states, because it provides that "every person authorized to make a will may appoint. . . . , provided the survivor, being otherwise qualified, shall be guardian of the children." Into which groups Massachusetts⁵ should be placed is questionable. This state provides for equal rights in making testamentary appointments and like "equal rights" generally, what is meant is uncertain. The statute with reference to testamentary guardians is also confusing in West Virginia.⁶ It provides that every father or mother may appoint. . . . ; where both father and mother have so appointed, only the guardian appointed by the survivor shall be entitled to the custody of the person of the child.

The remaining states are less liberal in giving testamentary power to the mother. Oregon⁷ and Wisconsin⁸ provide that the father may appoint and if he be dead, the mother may appoint a testamentary guardian, but if the father appoints, the mother shall not be deprived of the custody of the person of the child. Delaware,⁹ Maine¹⁰ and Vermont¹¹ give this power only to the father, leaving the mother with this power only in case the father has failed to exercise it during his life. Although the statutes of these states do not reserve the custody of the child for the mother during her life, it is understood that the father's appointment does not operate to take it away from her.¹²

Only in Georgia is there actually any statutory provision to the effect that the father's testamentary appointment can operate to deprive the mother of the custody of her children. The law of this state reads: "Upon the death of the father, the

¹Sec. 3382.

²Laws of New Mexico, 1921, chap. 50, p. 115.

³Sec. 5320.

⁴Sec. 5658.

⁵Acts and Resolves of Massachusetts (1922), chap. 461.

⁶Chap. 44, art. 10, sec. 1.

⁷Chap. 11, sec. 1307.

⁸Chap. 319, secs. 01, 02.

⁹Sec. 3916.

¹⁰Chap. 80, sec. 2.

¹¹Sec. 3648.

¹²S. P. Breckinridge and S. M. Simons, The Legal Status of Women, National League of Women Voters, p. 15.

mother is entitled to the possession of the child until his arrival at such an age that his education requires his guardian to take him."¹ But in this last state, judicial decree has modified this excessive power of the father. A decision of 1920² unanimously brought guardians under an Act of 1913³ which provides that "In all cases where the custody of children is involved between parents, there shall be no *prima facie* right to custody in the father, but the court hearing such issue of custody may exercise its sound discretion, taking into consideration all the circumstances of the cases, and determine solely what is best for the children's welfare and happiness." In this case a mother brought a petition to regain the custody of her fifteen year old daughter which she had lost by reason of her husband's testamentary appointment of another guardian. Both mother and guardian were considered suitable custodians. In awarding the custody to the mother, the judge stated: "If the law had remained unchanged by the Act of 1913 . . . we might have concluded that under the provisions the minor of fifteen should have been awarded to the guardian. While in terms this statute (1913) relates to cases between parents, it is not inapplicable between the mother and a testamentary guardian appointed by the deceased father and it is applied there."

The English statute of 1660 creating testamentary guardianship did not confer on the father the right to appoint a guardian for his illegitimate child, nor did it give such a right to the mother. At that time the illegitimate child was "nobody's child" according to the law. In the United States⁴ at the present time any mother of an illegitimate child may appoint a testamentary guardian for that child. The mother is the natural guardian of her illegitimate children. In Louisiana,⁵ although she is tutrix of her natural child not acknowledged by the father, or acknowledged by him alone without her concurrence, the father, after her death, is tutor to a child acknowledged by him alone. A natural child acknowledged by the father has for tutor, first the father and in default of him, the mother. This is the only statutory recognition of the putative father, although it is the practice of the courts to adopt the nomination of a guardian by a putative

¹Sec. 3022.

²Raines v. Harris, 150 Ga. 103 (1920).

³Georgia, Acts of 1913, p. 110.

⁴Iowa excepted.

⁵Merrick's Louisiana Civil Code (1900), sec. 256.

father where he has left an estate, and the person named is in all respects proper; but this act is simply in deference to the wishes of the deceased and not as a matter of right which the court is bound to respect.¹ Future legal developments which may extend the obligations of the putative father for the support of his natural children may also extend to him greater authority in matters of their custody and guardianship.

There have been other modifications of testamentary guardianship with respect to court supervision over the office. It has been held that the authority of the testamentary guardian is derived solely from the will and does not require either confirmation by the court or even the probate of the will. The better view, however, is that, while a guardian nominated by will is ordinarily entitled to appointment, yet his appointment, duties, and powers are governed by the general law regulating guardians.² Chancellor Kent³ makes the statement that a will merely appointing a testamentary guardian need not be proved. This should be received with caution at the present time because, in many states, wills have no validity until admitted to probate,⁴ and some states require the approval of the court and the giving of bond in the case of all guardians.

Placing the approval of the testamentary guardian in the hands of the court may indicate recognition of the super-parental function and duty of the state as well as a solicitude for the welfare of minor wards. These purposes may have guided legislators in their enactments. The intent of the law can be realized only to the degree that caution and social investigation guide the court in approving testamentary guardians. A perfunctory approval has only the value of making an official record, and the filing of the will or document on which the appointment rests would serve the same purpose at less expense. Furthermore, it is unreasonable to allow a father to assign freely and without supervision an authority over his child's estate which he cannot himself exercise without judicial approval and appointment. On the authority of a will, a guardian may assume the management of a child's estate and control the disbursement of funds, while a father can acquire such powers only from a court. Effective guardianship must provide competent care for the child. Proper social supervision of

¹Madden, Domestic Relations (1931), p. 460.

²Ibid.; Nation v. Green, 188 Ind. 697, 123 N.E. 163 (1919).

³Kent, Commentaries, II, p. 225.

⁴Woerner, op. cit., p. 58.

the testamentary guardian just as of any other guardian is essential to achieving this end.

The states have made testamentary guardianship subject to the approval and supervision of the court in varying degrees. A testamentary guardian in Georgia is not "required to give bond and security except in case of waste committed or in case of property coming to the ward from other sources than the will."¹ This is locking the barn after the horse is stolen. The majority of states, however, make this provision:

"Every testamentary guardian must give bond and qualify and has the same powers and must perform the same duties, with regard to the person and estate of his ward, as guardians appointed by the court, except insofar as their powers and duties are legally modified, enlarged, or changed by the will by which such guardian was appointed."

This provision is inadequate. It does bring under the requirements of bond and formal qualification those guardians who are not specifically excused by the will, but the testator's power of appointment is in no way limited.

A few states wisely limit the power of the testator in appointing a guardian. Missouri,² Nebraska,³ New Mexico,⁴ Vermont,⁵ and Washington⁶ specify that "testamentary guardians are subject to the same approval of the court as any other guardian." In Maine,⁷ a testamentary guardian is appointed "if suitable" and not otherwise. Alabama,⁸ Arkansas,⁹ Missouri,¹⁰ Virginia¹¹ and West Virginia¹² require these guardians to accept the trust and qualify for office within six months after the will is probated. Mississippi¹³ requires acceptance and qualification within three months, and Minnesota¹⁴ within thirty days. In Ohio,¹⁵ it has been held that a testamentary guardian is without authority to act as guardian until he has been appointed by the probate court having jurisdiction.

¹Sec. 3033.

²Sec. 380.

³Chap. 38, sec. 112.

⁴Chap. 62, sec. 106.

⁵Sec. 3648

⁶Sec. 9912.

⁷Chap. 80, sec. 2.

⁸Sec. 8097.

⁹Sec. 1161.

¹⁰Sec. 380.

¹¹Sec. 5315.

¹²Chap. 44, Art. 10, sec. 2.

¹³Sec. 1867.

¹⁴Sec. 8919.

¹⁵Henicle v. Flack, 3 Ohio.
App. 444 (1914).

Kentucky¹ and West Virginia,² in their statutes concerning preference in the appointment of general guardians, provide that a testamentary guardian is to be preferred. This seems to indicate that his appointment is not obligatory on the court. An Indiana³ decision states that a guardian nominated by will is entitled by statute to preference over all others but his appointment, duties and powers are governed by the law regulating guardians not so appointed. Throughout the country, the same requirements for mortgaging and selling real estate apply to testamentary as to other guardians. In every way, minors having testamentary guardians should have the same protection as other wards.

Guardians nominated by minors

At common law the attainment of the age of fourteen years was significant. It involved full criminal responsibility and terminated the old forms of guardianship for nurture and guardianship in socage. In the modern relationship of guardian and ward, this age is likewise significant. Among the earliest colonial legislative acts were those giving permission of minors over fourteen to choose their guardians.⁴ At present, in all but a few states, a minor of fourteen years or more may petition and nominate his own guardian who must be appointed if approved by the court. The law of these states usually reads, "when it appears necessary and convenient" to appoint a guardian for a minor over fourteen years of age, it is the duty of the court to cite the minor to appear and nominate a guardian of his choice. Only upon his failure to appear or upon his selection of an unsuitable person can the court proceed to appoint. Where the statutes give this power to minors, a court appointment without notice to the minor is void.⁵ Where two minors upon reaching fourteen petitioned for a guardian and their choice was rejected by the court, and the court appointed another, upon appeal, the higher court declared that the court had no authority to appoint another without allowing the minors time to make another nomination.⁶ Many states permit a minor having a guardian appointed by a court to nominate

¹Sec. 2021.

²Chap. 44, Art. 10, sec. 3.

³Nation v. Green, 123 N.E. 163, 188 Ind. 697 (1919).

⁴See chap. 11, p.

⁵Sherman v. Ballou, 8 Cow. (N. Y.) 304 (1828).

⁶In re Guardianship of Baptiste, 114 Okla. 116 (1925).

another upon reaching fourteen and when he does so, the former guardian can be compelled to make a final settlement and pay over to the new guardian all property in his hands. If no choice is made the old guardian continues in his trust. This permission does not extend to testamentary or chancery guardians, nor is a probate court bound to appoint a guardian upon the infant's application while the infant is a ward of the juvenile court. In California, a girl of sixteen, a ward of the juvenile court in the custody of a children's agency, petitioned to nominate a guardian of her own choice. Her petition was denied because her character was such as to require the careful supervision of a social agency and her upbringing in a proper foster home selected by it. The decision was based on the ground that discretion is with the court as to whether the appointment of a guardian appears "necessary and convenient."¹ On the whole, the statutes are silent about minors over fourteen changing guardians once they have chosen, but a few states specify that they must adhere to their choice except for good cause shown. Courts cannot permit guardianship to be changed to meet childish whims.² If a child is less than fourteen but old enough to have a preference, his wishes are usually consulted when courts are appointing guardians. In a Georgia case³ where both petitioners for the guardianship of a twelve year old child were deemed equally suitable and the lower court had refused to allow the child to express his wishes, the appellate court ruled that this was an error and that his wishes could be consulted but that the capacities of the petitioners should be considered of greater significance than his wishes.

In twenty-two states, not only many minors over fourteen nominate their own guardians, who if suitable must be appointed, but also minors having guardians previously appointed by the court may upon reaching that age nominate new guardians who must also be appointed if not unsuitable. These states are Arkansas,⁴ California,⁵ Connecticut,⁶ Delaware,⁷ Idaho,⁸ Illinois,⁹ Minne-

¹In re Guardianship of Hann, 100 Cal. App. 743, 281, P. 74, (1924)

²Lee's Appeal, 27 Pa. St. 229 (1856); for facts see p.

³Walton v. Twiggs, 91 Ga. 90 (1892).

⁴Secs. 4156, 4170.

⁵Probate Code of California (1931), sec. 1403.

⁶Secs. 4802, 4790.

⁷Secs. 3196, 3914.

⁸Secs. 7843-7845.

⁹Chap. 64, sec. 3.

sota,¹ Missouri,² Montana,³ Nevada,⁴ New Hampshire,⁵ New Jersey,⁶ New Mexico,⁷ North Dakota,⁸ Ohio,⁹ Oklahoma,¹⁰ South Dakota,¹¹ Texas,¹² Utah,¹³ Vermont,¹⁴ Wisconsin,¹⁵ and Wyoming.¹⁶ This freedom of choice is not given to minors having testamentary guardians except in Connecticut where a new guardian for the person may be nominated.

Nineteen states and the District of Columbia permit minors over fourteen years of age to nominate guardians but are either silent or provide against changing guardians upon reaching that age. These states are Alabama,¹⁷ Arizona,¹⁸ Colorado,¹⁹ the District of Columbia,²⁰ Georgia,²¹ Indiana,²² Iowa,²³ Kansas,²⁴ Kentucky,²⁵ Maine,²⁶ Massachusetts,²⁷ Michigan,²⁸ Mississippi,²⁹ Nebraska,³⁰ Oregon,³¹ Pennsylvania,³² Rhode Island,³³ South Carolina,³⁴ Virginia,³⁵ and West Virginia.³⁶ In Indiana, a guardian is not to be removed and another chosen when a ward reaches fourteen except for a good cause shown.

The statutes are silent with reference to nomination of

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| ¹ Secs. 8917, 8918. | ²¹ Sec. 3035. |
| ² Sec. 378. | ²² Sec. 3381. |
| ³ Secs. 10402, 10404. | ²³ Sec. 2574. |
| ⁴ Sec. 9497. | ²⁴ Chap. 38, sec. 206. |
| ⁵ Chap. 290, sec. 14. | ²⁵ Sec. 2022. |
| ⁶ Chap. 37, p. 3826. | ²⁶ Chap. 80, sec. 2. |
| ⁷ Chap. 62, sec. 102. | ²⁷ Chap. 201, sec. 2. |
| ⁸ Secs. 8875, 8877. | ²⁸ Sec. 15765. |
| ⁹ Sec. 10918. | ²⁹ Sec. 1868. |
| ¹⁰ Sec. 1434, 1440. | ³⁰ Chap. 38, sec. 104. |
| ¹¹ Sec. 3492, 3495. | ³¹ Chap. 11, secs. 1303, 1304. |
| ¹² Secs. 4116, 4126. | ³² Secs. 1021, 1026. |
| ¹³ Sec. 7810. | ³³ Sec. 5656. |
| ¹⁴ Secs. 3642, 3644. | ³⁴ Sec. 180. |
| ¹⁵ Chap. 319, secs 01, 13. | ³⁵ Sec. 5317. |
| ¹⁶ Secs. 7012, 7014. | ³⁶ Chap. 44, Art. 10, sec. 4. |
| ¹⁷ Sec. 8095. | |
| ¹⁸ Sec. 1408. | |
| ¹⁹ Sec. 5540. | |
| ²⁰ Sec. 1130. | |

guardians by minors in Florida,¹ Maryland, New York, North Carolina, Tennessee and Washington, although implied in the statutes of the last state. No doubt minor's wishes are taken into consideration in these states as well.

Further light on whether or not those states which are silent in their statutes permit minors with guardians to choose others at the age of fourteen must be sought in judicial decisions. A Pennsylvania case² of 1856 goes into this situation rather fully. A court appointed guardian who was superceded by one of his ward's choice challenged the validity of the new guardian in the absence of any cause shown for his replacement. Upon appeal, the court stated:

"We come now to the only question of importance . . . and that is, whether a ward, who has a guardian appointed by the orphan's court may at any time after he or she arrives at the age of fourteen, appear in court and by leave of the court make choice of a guardian instead of the one appointed by the court on their own motion and choice, and without showing or alleging any cause and whether, such choice having been approved by the court, the guardian appointed by the court is superceded.

Before the presentation of this petition we never heard it doubted but that a ward had the right after arriving at fourteen, by leave of the court, to make choice of a guardian and thereby annul the office of the guardian appointed by the court, and now after hearing the arguments of council and examining authorities cited, and some others, we are well satisfied that such is the law and, so far as we know, the universal practice and understanding of the profession."

The judge also said that guardianship by court appointment had, historically, superseded socage guardianship, and wards under socage guardianship which had terminated at the age of fourteen had had the privilege of choosing other guardians.

Decisions favorable to the replacement of guardians appointed by the court by those nominated by minors of fourteen have

¹In Pugh v. Bowden, 154 Fla. 302, 45 S. 499 (1907) where an infant wanted a guardian other than the one he had, the judge states that a guardian is an officer of the court and that an infant has no right to any particular guardian.

²Lee's Appeal, 27 Pa. St. 229 (1856).

been rendered in Alabama,¹ Georgia² and Kentucky,³ and perhaps in some other states; still other states take the opposite position. In a District of Columbia case,⁴ the judge declares that an infant for whom a guardian has been chosen by the orphans court has no right, on arriving at fourteen years of age, to choose another. The same declaration has been made for minors appointed under the law of Maryland.⁵ In Virginia⁶ when both the guardian appointed by the court and the one nominated by the minor were "unexceptionable men" for the trust, the court decided that a guardian cannot be removed simply at the request of the minor and without cause shown. In this case, the new guardian chosen by the minor was the minor's grandfather.

In a few states a minor over fourteen does not have to appear before the court or the judge in order to nominate a guardian of his choice, but his choice must later be approved by the court or the judge. A minor's nomination may be certified by any officer able to take conveyances in Alabama.⁷ In Maine,⁸ a nomination must be made before the judge or the register or in writing certified by a justice of peace. A minor may make his choice in Minnesota⁹ before a justice of peace, a clerk of the court, or a notary public. If a minor resides more than ten miles from the county court in Oregon¹⁰ a justice of peace, notary public, or any officer qualified to take an oath may certify a minor's nomination to the judge. A guardian nominated in this way must take oath and give bond as any other guardian appointed by the court; the judge or the clerk must approve the choice. In practice, other states may permit this without statutory provisions. Several of the colonial statutes contained provisions similar to these. With the difficulties of travel, and great distances to the court, such

¹Kelly v. Smith, 12 Ala. 687 (1849).

²Inferior Court v. Cherry, 14 Ga. 592 (1854); Bryce v. Wynn, 50 Ga. 332 (1873).

³Montgomery v. Smith, 3 Dana (Ky.) 599 (1835)

⁴Smoot v. Bell, Fed. Case. No. 13, 132, 3 Cranch C. C. 343 (1928)

⁵Mauro v. Ritchie, Fed. Case. No. 9, 312 (1827).

⁶Ham v. Ham, 15 Grat. (Va.) 74 (1859).

⁷Civil, sec. 8095.

⁸Chap. 80, sec. 2.

⁹Sec. 8917.

¹⁰Chap. 11, sec. 1304.

exceptions to ordinary procedure may have been justified. This informality does not seem excusable today and the minor should at least appear and be examined privately by the judge. This is the requirement in some states. It should be pointed out, however, that such a certified nomination is probably as satisfactory as one to which the court gives direct but casual attention to. A Kentucky decision¹ declared a minor's nomination in writing void under a statute which requires that minors be privately examined by the judge before making nominations. This was a case where the minor signed a paper nominating a trust company, the papers having been drawn by the company's attorney. The ward petitioned the court to be allowed to appoint another guardian, as she was "dissatisfied and made miserable by the management of those, who, in the name of the trust company, controlled her."

Without facilities for investigation, the court or judge is poorly enough prepared to determine the suitability of the minor's choice or the presence or absence of undue influence on the minor in making his choice, with the minor before them. They are less prepared to approve a nomination certified by a notary public. Certainly, children of fourteen should be assisted by social workers in making this very serious choice of a guardian.

The limited discretion given the court or judge in approving nominations of guardians by minors of fourteen, whether in the first instance or upon changing guardians, deserves serious consideration. The statutory direction that the minor's nomination, unless unsuitable, must be approved by the court appears to be strictly construed. In notable contrast with other occasions, this occasion does not permit the court or judge to exercise full discretion in determining the welfare or best interests of the minor. It is said in a California case that "The whole scheme contemplates the absolute right of the minor to have a guardian of his own selection after he is fourteen," and that discretion can be exercised only as to suitability of that selection.² Another California decision³ declares that, under the code⁴ of that state, a minor on arriving at the age of fourteen years has an absolute right to nominate a guardian to displace one already placed, even though the displaced guardian may be one of his own parents, the question of the nominee's suitability alone coming under the dis-

¹Garth v. Taylor, 115 Ky. 128 (1903).

²In re Kirkman's Estate, 168 Cal. 688 (1914).

³Collins v. Superior Court of Monterey Co., 52 Cal. App. 579 (1921).

⁴Code Civ. Proc., secs. 1748, 1750.

cretion of the court. In this latter case, the minor was petitioning for his father to replace his divorced mother. This fact, however, did not appear to carry any weight in the decision. The same doctrine is pronounced in an Oklahoma decision.¹ It has been held in Alabama² that it is not even necessary to give the former guardian notice of the new guardian's appointment because he is not allowed to show any cause to the contrary. This is a dangerous policy. The entire burden of proof of unsuitability is placed on the court, and cause must be shown to declare the nominee lacking in suitability. The possibility of a court being unable to show unsuitability and at the same time being convinced that the old guardian or another person would better serve the welfare of the minor is not difficult to imagine. If the rights of parents can be subordinated to the jurisdiction of the court for the welfare of a minor, certainly the minor's nomination of his guardian should be subject to the full discretion of the court.

Without supervision of a disinterested sort, it is questionable whether minors should be allowed to change guardians appointed by the court at any time after arriving at the age of fourteen years. Minors with testamentary guardians or chancery guardians are not given this privilege, nor can natural guardians be removed except for cause. If the relationship is satisfactory, the more permanent it is, the better. Sometimes when minors have changed guardians, they are not satisfied and wish to do so again. The court looks with disfavor upon frequent changes. Wards of fourteen years may object to even the necessary discipline of their guardians. A stranger may encourage a ward to change his guardian and seek the nomination himself for possible benefits from the estate. Adolescence is a period subject to influences of all sorts. A child of fourteen is not necessarily the best judge of what serves his best interests. On the other hand, the minor's welfare and happiness are of greatest importance and opportunity should be given him to change one guardian for another whenever it would accomplish this purpose. If the court gave constant, intelligent, and adequate supervision to guardianships, it would be informed when a change would serve the best interests of the child. Without such supervision, the court can have no assurance that a change of guardians will serve this end. To make this possible the supervision of social case workers is necessary. A change of custody requires a sound social decision based on knowledge of all the factors in the case and an interpretation of

¹Given v. Pollack, 96 Okla. 25 (1923).

²Kelly v. Smith, 12 Ala. 687 (1848).

the child's needs as a whole rather than in one particular regard. A social case worker attached to the court, representing the interest of the state in a relationship which the law makes possible, and giving continuous supervision could supplement and guide the guardian and the ward in such a way that the ward would not desire a change from one guardian to another. The fact that children do, in many cases, wish to change guardians signifies that the relationship has not satisfactorily served in the place of the relationship of Parent and Child.

Guardians in Socage

"At common law, if lands held in socage tenure came to an infant by descent, his nearest relative who could not by any possibility inherit the lands was his guardian in socage until the age of fourteen. . . ."¹ To insure the safety of the ward, the guardianship was given to the next of kin who could not inherit, for the trust extended over the person as well as the land.² The extent of its use in the early American colonies is uncertain. In its strict sense it never existed here by reason of the absence of socage tenures and the fact that there is no relative to whom the land could not descend. The guardian of the person and estate has been held to be a substitution for guardians in socage.³ The term "socage" could well be eliminated entirely in American guardianship law, for it is misused and signifies an office identical with that of general guardians.

In the United States at the present time this form of guardianship is mentioned in the statutes of only three states. In South Carolina statutes, the term is used only once; in connection with the authority of testamentary guardians in a statement frequently found in colonial statutes, "Testamentary guardianship shall be good and effectual against all and every person or persons claiming the custody of a child or children as a guardian in socage or otherwise."⁴ New Jersey refers to it in the same way.⁵ In New Jersey, however, socage guardians are named

¹Blackstone, I, 461.

²Ibid.; Coke Upon Littleton, sec. 123.

³Graham v. Houghtalin, 30 N. J. L. 552 (1863); Mills v. McAllister, 2 N. C. 303 (1796); Arthur's Appeal, 1 Grant (Pa.), 55 (1854).

⁴Compiled Statutes of New Jersey (1709-1910), chap. 86, sec. 1.

⁵Sec. 5563.

in connection with those to be preferred in the appointment of a guardian. There is a provision that a guardian in socage has a right to the guardianship unless there is a testamentary guardian, or the child is fourteen.¹ This probably amounts to no more than the preference given relatives in other states. In the Revised Statutes of New York, there is a section entitled Guardians in Socage but it is very evident that the form described bears little resemblance to the guardianship in socage at common law. The provisions of this section are:

"Where an estate in lands shall become vested in an infant, the guardianship of such infant, with rights, duties, and powers of a guardian in socage, shall belong (1) to the father of the infant, (2) if there be no father, to the mother, (3) if there be no father or mother, to the nearest and eldest relative of full age, not being under any legal incapacity, and as between relatives of the same degree of consanguinity, male shall be preferred."²

The effect of statutory recognition in New York has been stated by the court:³

"As the common law socage tenure was swept away by the Revised Statutes, the statutory guardianship was constituted to take the place of the common law guardianship in socage, and it may for convenience be called by the same name."

The guardianship constituted by statute was like that in socage, except that it continued until twenty-one and relatives who could inherit were not excluded.⁴ These two exceptions eliminate the characteristics of guardianship in socage except in one respect, which is that it occurs upon the descent of land to an infant. This distinction seems to differentiate it from other forms of guardianship in New York today, but even this is uncertain.⁵ The use of the term in New York is confusing rather than indicative of the meaning, as it is understood at common law.

¹Compiled Statutes of New Jersey (1709-1910), chap. 86, sec. 40.

²New York, Revised Statutes (8th ed.), Part 2, chap. 1, title 1, art. 1.

³Foley v. Mutual Life Insurance Company, 138 N. Y. 333, 339 (1893).

⁴Ibid.

⁵Foley v. Mutual Life Insurance Company, 138 N. Y. 333-339 (1893); Whitlock v. Whitlock, 1 Dem. Surr. (N. Y.), 160 (1882); Sylvester v. Ralston, 31 Barb. (N. Y.), 286 (1860).

The only other indication of a possible influence of guardianship in socage and the method it uses for the protection of minors is found in New Mexico¹ where the statute directs that no probable heir may be appointed except the father or the mother of a minor child.

Guardians Appointed by the Courts

Chancery guardians constitute the most important class of guardians in England. The power of chancery courts to appoint guardians exists in the United States so far as it has not been taken away by statute.² In this country, although courts of equity often retain a general jurisdiction over the persons and estates of infants, the matter of guardianship is usually exclusively delegated by statute to the probate or other court of record to which is intrusted also the supervision over the estates of deceased persons.³ "Notwithstanding any superior unfettered powers of chancery, jurisdiction is now practically confined, in all the states, to courts exercising testamentary jurisdiction. Guardians are now rarely appointed by chancery courts."⁴ General guardians appointed by the courts have substantially supplanted all other classes in the United States.⁵ The term "general" is applied mostly to distinguish them from chancery, testamentary guardians, and guardians ad litem.⁶

In the appointment of a "fit and proper" guardian, the court has a liberal, but not an arbitrary, discretion. It will usually respect the natural claim of the father to act as guardian,⁷ being bound to do so by the laws of some states. An appointment too informal to stand as a testamentary appointment, has great weight with the court, and generally, the wishes of a deceased parent will prevail, in the absence of good reasons to the contrary.⁸ The statutes of many states prescribe who are to be preferred and specify that the preference be in the order named.

¹Chap. 62, sec. 105.

²Pomeroy, Equity Jurisprudence, sec. 1306, note 2.

³Woerner, American Law of Guardianship (1897), Preface,
p. vi.

⁴Schouler, Domestic Relations (4th ed.), p. 449.

⁵Woerner, op. cit., p. 75.

⁶Ibid., p. 76.

⁷21 Cyclopedia of Law and Procedure, p. 32.

⁸Madden, Domestic Relations, p. 461.

The best interests of the infant will prevail, even against the claims of parents when they are not suitable. It is the child's best interest which, in the last analysis, rests with the discretion of the court and which gives the court a superior authority in all matters pertaining to guardianship. After parents, preference is usually given to the next of kin.¹ In general, relatives are to be preferred in the order of their kinship. Only two states, Pennsylvania² and Missouri,³ specify preferment according to religious faith. Missouri omits this preference when no suitable one can be found of the same faith. Coverture is no longer a disqualification for the office of guardian.⁴ Testamentary trustees may be appointed guardians; in fact, trusteeship has been held to be a circumstance favorable to appointment.⁵ The statutes of some states, instead of naming those to be preferred, specify persons not to be appointed guardians. These are generally officers of the court or executors and administrators,⁶ who have interests adverse to those of the minor. Corporations are eligible for appointment as guardians of the estate, provided they are authorized in their charters to accept such trusts.⁷

The statutes of sixteen states⁸ recite that the court of proper jurisdiction may appoint guardians "when it appears necessary or convenient, upon petition. . . ." The other states specify particular occasions when the court is to appoint guardians, such as "when a minor is under fourteen and needs a guardian; when a minor is fourteen and fails to nominate a guardian

¹21 Cyclopedia of Law and Procedure, p. 35: "It is believed to be a rule, however, that other things being equal, the relative will be preferred to strangers." The court, however, is not restricted to them.

²Sec. 1022.

³Sec. 392.

⁴21 Cyclopedia of Law and Procedure, p. 36.

⁵Capps v. Hickman, 97 Ill. 429 (1881).

⁶21 Cyclopedia of Law and Procedure, p. 36; Isaacs v. Taylor, 3 Dana (Ky.), 600 (1835); In re Rickard, 15 Abb. Pr. N. S. (N. Y.), 6 (1873).

⁷21 Cyclopedia of Law and Procedure, p. 27; Rice's Case 42 Mich. 528, 4 N. W. 284 (1880).

⁸California, Connecticut, Florida, Iowa, Nebraska, New Hampshire, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Utah, Washington, and Wyoming.

after a ten day citation; when a minor's choice is not approved by the court; when a testamentary guardian renounces his trust or fails to appear; when a minor resides out of the state and has property within the county; or when there is no applicant who can qualify." The court's appointment may be for the person or estate or both, according to the need of each child.

Although discretion is with the court to give first consideration to the child's best interests,¹ the statutes limit and guide the court's appointment. The fullest directions are found in the identical statutes of Arizona,² California,³ Oklahoma,⁴ North Dakota,⁵ South Dakota,⁶ and Utah:⁷

"The court shall be guided by the best interest of the child as to its temporal, mental and moral welfare; shall consider the child's preference if the child is of sufficient age to form an intelligent preference; prefer the mother if the child is of tender age; the father if of an age for education for business or labor; and of two persons equally entitled the court shall give preference in the following order: (1) a parent, (2) one indicated by the wishes of a parent, (3) one already standing in the position of trustee of the child's funds for support, and (4) a relative."

In every state except Pennsylvania,⁸ parents, if suitable, may be appointed guardians of the child's estate. They are given first preference in some states. The father is named first as the one to be preferred in Alabama,⁹ and the District of Columbia.¹⁰

"Parents" or "father and mother or either," or "father or mother if living and competent" are given first preference in Idaho,¹¹

¹The only exception is where the court is limited to the nomination of the minor if not unsuitable in a number of states.

²Sec. 4118.

³Secs. 1406, 1407.

⁴Sec. 6585.

⁵Secs. 4461, 4462.

⁶Sec. 3496.

⁷Sec. 7810.

⁸Purdon, Pennsylvania Statutes (1930), sec. 1024: "Except parents may receive \$200 or less for their children and account therefor in the same way as any other guardian."

⁹Sec. 8096.

¹⁰Sec. 1128.

¹¹Sec. 7846.

Kentucky,¹ Montana,² New Hampshire,³ Tennessee,⁴ Vermont,⁵ and West Virginia.⁶ The only preference named in Indiana⁷ and Ohio⁸ is that of the testamentary guardian. The testamentary guardian is to be preferred only after parents in Kentucky⁹ and West Virginia.¹⁰ If there is more than one applicant, the judge must prefer the nearest of kin by blood if otherwise fit or likely in his opinion to manage the estate best in Alabama,¹¹ Georgia,¹² Kentucky,¹³ Mississippi,¹⁴ and in Oregon,¹⁵ the adult brother or sister or other good relative in the order named. In New Jersey,¹⁶ if there is no testamentary guardian, guardians in socage have a right to be appointed. In the District of Columbia,¹⁷ after the father and the mother, the husband of a married infant female has preference. The person having the custody of the child and the child's own preference usually carry special weight with the court, whether given statutory preference or not.

Some states list persons not to be appointed guardians. In Arizona,¹⁸ no clerk, sheriff, or judge of probate, can be appointed guardian, nor a deputy or attorney at law be taken as sureties. In Ohio¹⁹ and Tennessee,²⁰ no administrator or executor of the last will is eligible until the final accounts of his administration are settled. No probable heir except the father or mother may be appointed in New Mexico.²¹ No guardian can act as guardian of the estate under the jurisdiction of any county judge in Oklahoma²² if that judge is under any financial obligations to the guardian and should any county judge while holding office become pecuniarily liable to any guardian, such shall disqualify him from acting. In North Dakota,²³ any person twenty-one years of age who is not incapable by law of making a contract, has not

¹Sec. 2021.

²Sec. 10405

³Chap. 290, sec. 15.

⁴Sec. 8468

⁵Sec. 3640.

⁶Chap. 44, Art. 10, sec. 3.

⁷Sec. 3382.

⁸Sec. 10931.

⁹Sec. 2021.

¹⁰Chap. 44, Art. 10, sec. 3.

¹¹Sec. 8099.

¹²Sec. 3037.

¹³Carroll's Kentucky Statutes (1930), sec. 2021.

¹⁴Sec. 1868.

¹⁵Chap. 11, sec. 1301.

¹⁶Chap. 14, secs. 37, 40, 80.

¹⁷Sec. 1128.

¹⁸Sec. 4177.

¹⁹Sec. 10917.

²⁰Sec. 8467.

²¹Chap. 62, sec. 105.

²²Sec. 1431a.

²³Sec. 8682.

been convicted of a felony, is not a partner of the decedent at the time of his death, has not been found unfit for the discharge of duties by the court for drunkenness, improvidence, mental or physical infirmity, or lack of integrity may be appointed. Oregon¹ specifies that a guardian must be a United States citizen of good moral character.

The statutes of the several states require for the appointment of guardians that the minor have domicil, residence or property situated within the jurisdiction of the court before whom the petition is brought. The statutes are silent as to the residence requirements of the guardian. By and large, the guardian appointed will likely be a resident. On the other hand, a statutory limitation on non-resident guardians might operate very disadvantageously. The testamentary guardian nominated by a parent and the one considered most desirable by the parent might reside elsewhere than within the jurisdiction of the court where the minor and his property are situated. The same is true of relatives. Since the appointment of guardians is left to the discretion of the court, there seems little occasion to limit possible guardians to one county. More important would be a strict and enforced requirement that guardians taking wards outside the jurisdiction in which they were appointed do so under the direction of the court and qualify in the court of the wards' new residences.

As will be learned in the section of Procedure, the court does not ordinarily exercise its power to appoint guardians except upon petition of the child, a relative or next friend. A very few states have statutes making it the duty of any officer of the court or any public officer to report to the court any child who is without guardianship. This provision is frequently found in colonial laws. Definite responsibility for bringing to the attention of the court those who are in need of guardianship should be placed somewhere.

Sufficient authority is given the courts for the appointment of guardians. Two great deficiencies stand out in their exercise of this authority. One is in their ability to appoint guardians who will best serve the welfare of the minors. The other is in the fact that the court is under no obligation to provide guardians for all minors who are in need of them. The court's position is entirely passive.

¹Chap. 11, sec. 1301.

Guardians Appointed by the Court under the
Uniform Veterans' Guardianship Act¹

Guardians appointed by courts under this Act do not differ in any important respects from other court-appointed guardians. They are given separate attention here because their requirements, appointment procedure, regulation etc. do not differ from state to state as do those for other guardians. They are subject to the uniform act and supervision by the guardianship division of the Veteran's Bureau. These laws and their administration offer the only attempt thus far toward uniformity and the only utilization of social service work in connection with this relationship.² Some results of the influence of the Veterans' Bureau's cooperation with the courts will be considered later. This Act was drawn up in 1928 and about one-half of the states adopted it the next year. By 1933, thirty-five states had adopted it verbatim and all the others except five had passed acts similar to it. The five states which did not have such statutes are Delaware, Illinois, Oregon, Rhode Island, and Wisconsin. This Act is either included as a separate division of the statutory chapters on Guardian and Ward or written elsewhere in the statutes.

Before benefits from the United States Veterans' Bureau can be received by minor or mentally incompetent wards, a guardian must be appointed to accept the payments. The local judiciary having competent jurisdiction over other guardians and wards administers this guardianship procedure according to the state laws on Guardian and Ward except where these are changed by the Uniform Veterans' Guardianship Act. Only sections applicable to minor wards are included here. Under this Act, the United States Veterans' Bureau, through which the government benefits are paid, is a party to guardianship proceedings, although the appointment and supervision of guardians is largely left to local courts. The staff of the guardianship division of the Bureau is steadily increasing, and the requirements for its members are steadily being

¹Statutory citations are omitted because the Act is given in toto and is readily located in the indices of the Compiled Statutes.

²For full discussion of the guardianship provisions of the United States Veteran's Bureau see: Katherine Kouschuetzky, "Minor Beneficiaries of the U. S. Veterans' Administration." Unpublished Master's thesis,

raised. With adequate personnel, it is to be expected that this staff will participate more and more both in the selection of proper guardians and in the careful supervision of them.

Guardians are appointed when the Director of the Bureau requires, prior to the payment of benefits to wards. Unless they belong to the same family, no guardian, except a bank or trust company which acts for estates only, can serve for more than five wards. When a minor ward is entitled to these benefits, a petition is filed in the court of competent jurisdiction by or in behalf of any person who is entitled to priority. If no one is entitled to priority or the one so entitled neglects or refuses to petition within thirty days after the mailing of a notice by the Bureau to that person's last known address indicating the necessity for petition, a petition may be filed in any court having jurisdiction by any responsible person residing in the state. The petition must relate the name, age, place of residence of the minor, the names and residence of the nearest relative, the fact of being entitled to money from the Bureau, and the name of the person having the custody of the minor. A certificate from the Director of the Bureau or his representative to the effect that a guardian is prerequisite to the payment of money is prima facie evidence of the necessity for guardianship. The court then gives notice as required for the appointment of any guardian in the state. Before appointing a guardian under this Act, the court is charged with being satisfied that the guardian is a fit and proper person and requiring from the guardian a bond approved by the court in a sum not less than that due and estimated to become payable during the ensuing year. The court is assisted in appointing guardians by the social workers, regional guardianship officers of the Bureau with the aid of service organization and social agencies when this assistance is available. Additional bond may be required at any time. If personal sureties are given, they must file with the court a certificate under oath which shall describe the real and personal property owned by them and show that they are worth the sum named in the bond over and above all debts and property excepted from execution.

Full, true, and accurate annual accountings under oath are required on the anniversary date of appointment. This statement should be modified because in 1932 this requirement was waived by order of the Solicitor in favor of the state's own requirement for reporting. This is unfortunate because some states require accountings only every three years or whenever the judge requires. The accountings must include all moneys received and all disbursements, showing the balance on hand at date and how it is invested. The guardian must send a certified copy of the account to the

office of the Bureau in his area. The court fixes a date for hearing on the account from fifteen to thirty days after the date of filing and notifies the guardian and the Bureau of the date. Failure to account within thirty days after a demand by the court or the Bureau is ground for removal. Service organizations such as the American Legion, the Auxiliary, the Red Cross, and social agencies assist the paid workers of the Bureau in examining these accounts and supervising the guardianships generally.¹ The guardian's compensation shall not be more than five per cent of the income during any year, although upon notice and hearing another five per cent may be allowed for extraordinary services. No compensation is allowed upon the corpus of the estate received from a preceding guardian. The expense of bond premiums is also allowed.

In accordance with law and the approval of the court, a guardian invests funds from this source in a manner and with sureties in which he has no interest. When a ward reaches majority, the guardian, after making a satisfactory final settlement, shall be discharged when he petitions. In the administration of this Act, courts have frequently appointed bank and trust companies guardians of the estate and a relative or the one already having custody, guardians of the person. The merits of trust company administration, particularly of small estates where the company receives money and pays it over to the guardian and collects a fee for so doing, will be considered later. To the extent to which this Act applies, the law relating to Guardians and Wards is uniform throughout the United States. The administration of this Act is notably good because of the cooperation of the Bureau and its workers. With an increase in their numbers and a rise in their standards under civil service requirements, a more uniform and equitable administration can be expected.

Guardians ad litem

The temporary nature and specific purpose of the guardian ad litem renders this office different from the guardianship or substitute parental relationship considered in this study. It is nevertheless included because it is usually listed among other forms of guardianship. Its necessity frequently arises by reason of the absence of a guardian of a permanent nature, and it is an office which, for some purposes, supplements the office of other

¹Ibid., pp. 36-73.

guardians.¹ Every court in which a suit is brought against an infant has the power to appoint a person to defend him, when he has no guardian; for, since an infant cannot appoint an attorney, he would otherwise be without assistance.² A person so appointed is called a 'guardian ad litem,' and his powers and duties are limited to the particular litigation for which his appointment was made. In general, an infant is represented in legal matters by his natural or legal guardian, if he has one. The court is free, however to appoint another, and in some states must appoint another for special purposes such as the final settlement of a guardian's account, the sale of real estate, etc.

In twenty-four states the following section is written into the chapters entitled Guardian and Ward: "Nothing contained in this chapter affects or impairs the power of any court to appoint a guardian to defend the interests of any minor interested in any suit or other matter pending therein." These states are Arizona, Colorado, Idaho, Illinois, Indiana, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Jersey, New Mexico, North Dakota, Oklahoma, Oregon, Rhode Island, South Dakota, Utah, Vermont, Wisconsin, and Wyoming.

Other states do not copy this blanket reservation, but provide for the appointment of a guardian ad litem for special suits and sometimes specify how the appointment shall be made; for instance: when an infant is plaintiff, upon his application if he is fourteen, or of a relative or friend if under fourteen years; when an infant is defendant, upon application of the infant, if fourteen, and by the court if the infant fails to select within ten days after service of summons or upon the application of a relative, friend, or any party to the action, if the infant is under fourteen. Such provisions for suits are made in Arizona, California, Connecticut, Delaware, Iowa, Louisiana, Missouri, Nevada, New Hampshire, North Carolina, Pennsylvania, Nebraska, South Carolina, Washington, and West Virginia. They are also included in the chapters entitled Guardian and Ward. Louisiana requires that the guardian ad litem must be an attorney.

A few states make requirements for appointing guardians ad litem when there are other legally appointed guardians, particularly managing the ward's real estate. In Alabama,³ the

¹Citations are given only where these guardians are specifically related to the activities of other guardians.

²Madden, op. cit., p. 464.

³Chap. 299, secs. 8172, 8185, 8186, 8189, 8197.

appointment of a guardian ad litem is necessary for granting orders for the sale of property, for investment, for maintenance and education, and for the sale of the property. The same is true in Virginia.¹ Kentucky requires one for making a lease as well as for mortgaging and selling real estate.² New York requires a guardian ad litem when it appears necessary for settling complaints in real estate;³ Tennessee for proceedings for the "encroachment upon the corpus of the estate for support and education";⁴ West Virginia "for disbursements beyond the annual income";⁵ a guardian ad litem must be appointed in Florida⁶ for proceedings on accounts and settlements of a ward's interests. Ohio provides that such an appointment is not necessary for a sale unless the "prayer of the petition is contested."⁷

The remaining states provide for the appointment of guardians ad litem in the statutes on Infants but not in the chapters on Guardian and Ward. These special guardians may be used to supplement and check natural and legal guardians, but they are more often used when there is no other guardian.

Public Guardians⁸

A number of states have created the office of public guardian to meet needs which the laws on Guardian and Ward⁹ fail to cover. The public guardian, who is always a county official, serves only as a temporary guardian or in the absence of another guardian or when no person is able or willing to qualify. His rights and duties are the same as those of a private legal guardian in regard to the wards and their estates entrusted to his care. Letters of guardianship are issued to him only after a period of time during which no application has been made, that is, in cases other than those where he serves as temporary guardian.

¹Secs. 5321, 5338.

²Secs. 3031a-3033.

³Chap. 51, sec. 506.

⁴Sec. 8520.

⁵Chap. 44, Art. 10, sec. 8.

⁶Sec. 5908.

⁷Sec. 10782.

⁸This relationship is somewhat different from other kinds of guardianship, but is better taken up at this point of the study than at any other.

⁹Chap. 64, secs. 58-62.

If at any later time another person qualifies, his letters are revoked. The statutes indicate that this office is utilized only as a last resort. It is not an office which seeks out minors in need of guardians or protects wards with negligent or corrupt guardians. To understand why some states have provided for public guardians and other states have not would necessitate an investigation into the history of the bills creating this office and the situations which arose to promote their presentation and passage. These bills were passed in the greater number of states having public guardians around 1870 to 1885.

Statutory provision for a public guardian is made by nine states. In Alabama,¹ Illinois,² Kentucky,³ and North Carolina⁴ the office is separately constituted. Tennessee⁵ combines the office of public guardian with that of public administrator and entitles it "Public Administrator and Guardian." Missouri⁶ and Georgia⁷ also combine these functions and state that the public administrator is "ex officio" public guardian. Wisconsin⁸ does not designate the public administrator as public guardian but gives him the duties of guardianship over the estates of minors. South Carolina⁹ statutes require the judge of the probate court in each county to act as public guardian. In addition to these nine states, Mississippi¹⁰ provides that the clerk of chancery may be appointed to fill a similarly described need, although the title "public guardian" is not used. No provision for a public guardian is found in the laws of the thirty-eight remaining states or the District of Columbia. Many states provide for public administrators who may possibly perform the duties of public guardian, but this summary includes only those states whose public administrators are definitely assigned the duties of public guardian.

The several states show considerable variation in the mode of appointment to this office and in its duration. In Alabama, a "general county guardian" is appointed by the probate judge and he continues in office during the term of the judge appointing him. The statute in Illinois reads as follows:

"The governor of the state, by and with the consent of the senate, shall before the first Monday in December, and every

¹Secs. 8100, 8101.

⁶Sec. 438.

²Chap. 64, secs. 58-62.

⁷Secs. 3040-3142.

³Secs. 3903, 3907.

⁸Chap. 311, secs. 15, 17.

⁴Secs. 2191-2194.

⁹Secs. 5553-5562.

⁵Secs. 837-844.

¹⁰Sec. 1871.

four years thereafter appoint in each county of the state and as often as vacancies occur, a suitable person to be known as public guardian."

Kentucky provides that "the county court shall appoint in each county a discreet fit person" whose term of office is two years. In North Carolina, the clerk of the superior court in every county may appoint a public guardian for a term of eight years. In Alabama and Kentucky if a county lacks a public guardian and one is needed a sheriff may serve, as public guardian in which case his appointment and its duration is determined by the provisions for the sheriff's office. County courts in Tennessee have power at any quarterly session to appoint or elect a public administrator and guardian who shall hold office for four years. In the other five states the public guardian is a function of another office and the mode of appointment and term therefore depends upon the regulations of the other office.

In every case public guardians take oath and give bond or, if they are already holding another office, are made liable on their official bond. Alabama does not prescribe the amount of the bond. Illinois requires a bond of not less than \$5,000.00 with two sureties approved by the court. Kentucky fails to specify the amount but prescribes that the bond be with good surety to the Commonwealth. In North Carolina a public guardian enters bond with three or more sureties in a penal sum of \$6,000.00 payable to the state and "when aggregate estates in his hands are worth more than one-half the value of the bond he shall increase it to double the worth of the estate." The amount of the bond is left to the discretion of the court in Tennessee, but the statute specifies that it be sufficient to protect the funds and property of the estate. The bond of public administrators in Missouri serves for the additional liabilities involved in the duties of public guardian. The county administrators in Georgia give additional bond of \$5,000.00 for the discharge of the county guardianship duties. Wisconsin requires that the bond of the public administrator be not less than \$1,000.00 with sufficient sureties and that the expense of surety shall be paid by the county treasurer out of any inheritance tax funds in his hands and belonging to the state or by order of the county judge. The judge of probate who serves as public guardian in South Carolina is responsible on his official bond for the faithful discharge of these extra-judicial duties. In Mississippi the clerk of chancery must give extra bond and his official bond is also liable. He is not constituted as a public guardian per se and consequently gives bond in relation to each separate appointment as guardian. Provision for the requirement of additional bond at any time is common to

all ten states.

The statutes of all ten states provide that public guardians are governed by the same laws, have the same powers and duties, are subject to the same liabilities, receive the same compensation as other guardians, and may be removed for the same causes. The county guardian in Alabama is appointed when no other person qualifies. The statutes specify a limit of three months on qualification in Illinois after which it is the duty of the court to appoint the public guardian. Kentucky provides that the court shall confide in the public guardian "the care and control of the persons and estates of all minors in case it shall appear that such minor hath no testamentary guardian and that no one will apply for or serve as such by the appointment of the court." If there is no public guardian in a county and no one else qualifies for three months after the death of the intestate, the court may appoint the sheriff to administer the estate. The statutes make no mention of what disposition the court should make for the person of the minor in such a case. In North Carolina letters of guardianship are issued to the public guardian (1) when six months has elapsed since the discovery of any property belonging to minors without guardians and (2) when any person entitled to the letters of guardianship shall request, in writing, the clerk of the superior court to issue letters to the public guardian. The Tennessee statute provides that "should any person entitled to the administration of an estate, or to the guardianship of any minor, idiot, or lunatic, fail or neglect to go to the county or probate court having jurisdiction and take out letters of guardianship within six months after the death of the intestate, or within three months after settlement of the estate by an administrator, it shall be the duty of the Public Administrator and Guardian to enter immediately upon such, first applying for letters." Letters may be issued earlier if those entitled to guardianship refuse. A two months notice must be given those entitled to the letters. When a necessity for a guardian exists in Georgia, the ordinary, after thirty days notice in a public gazette, may appoint the county guardian. The public administrator in Wisconsin is appointed guardian of the estate of a minor when his guardian has been removed by the court, or resigns this trust, or refuses to act, or when final settlement of an estate is made and the residue is assigned to a minor and no interested person applies for appointment within thirty days and it appears necessary that guardianship should be granted without delay. He also serves as guardian for non-resident minors. In South Carolina judges of probate are required to act as public guardians of the estates of minors who are without general or testamentary guardians

and where it is shown to the court of common pleas, on petition filed for that purpose, together with a statement of the nature, condition, and value of the estate which has been published once a week for two weeks previously in a county newspaper and also posted on the court house door, and that no fit person can be person can be found who is willing to assume guardianship. If the judge hearing the petition is satisfied he shall endorse the application. The length of time elapsing before the clerk of chancery in Mississippi may be appointed to guardianship is not stated, although three months are allowed for the qualification of testamentary guardians.

Public guardians give bond and are liable thereon for the proper administration of their office. Presumably they make periodical reports to the court having jurisdiction over other guardians and ward and are subject to the same supervision in the management of the estates in their control. Except for a general statement to the effect that public guardians have the same rights, duties, and responsibilities as other guardians there is no reference to special supervision in any of the ten states with the exception of South Carolina. In this state the court of common pleas issues the letters of guardianship to the probate judge and the latter must submit in open court once a year at the first term of court and oftener if the judge of the circuit court requires "a report of all his actings and doings as public guardian" which if approved is filed in the office of the clerk of the court of common pleas. All his investments must be approved by the judge of common pleas or judge or the circuit court upon petition and proof of their being safe and proper. South Carolina further provides that the judge as public guardian is discharged with the finishing of each guardianship.

It is interesting to note that in the private legal relationship of Guardian and Ward the judge and the sheriff are the particular officers prohibited from serving as guardians to the wards of their counties in a number of states. The presumption of their inability to administer guardianship faithfully seems to be inoperable when no suitable private guardian can be found.

Such an office so subject to political corruption seems totally unsuited for the proper care of the persons and estates of minors. The constant change in personnel is bound to destroy continuity and satisfactory responsibility in the administration of this trust.

The office of public guardian, however unsuited in its present form, nevertheless suggests a possible way by which the state might assume more effective responsibility for its wards. By and large this office now serves only for the left-overs.

Occasionally, it serves temporary purposes for wards who have or will have guardians, but it has further possibilities. Public guardians in North Carolina assume guardianship upon the request of the one having claims to the guardianship. Were this office safeguarded by educational and civil service requirements, it can be easily imagined that many privately appointed guardians would choose to have the assistance of its officers and be relieved from responsibilities. The public guardian's office might readily be extended to take an active part in the investigation and supervision of other guardianships within its jurisdiction and to serve as a court administrative officer. Changes necessary for the command of public confidence and respect would have to be made before such an extension. Personal and other qualifications for the office would have to be set up and selection of personnel made according to a highly protected merit system. Furthermore, being directly affiliated with the court, it would probably remain a purely local office without any state supervision. Other suggestions for the improvement of this phase of public administration will be made elsewhere. It is only suggested here that the creation of the office of public guardian in ten states indicates that the provisions for Guardians and Wards generally have been found inadequate and that it might lead to other steps toward a comprehensive public care of minors without natural guardians.

CHAPTER IV

DUTIES OF GUARDIANS

Guardianship of the Person

Guardianship of the person of minors is vested naturally in the parents or either of them. The statutes deal with this relationship in the chapters devoted to the subject of Parent and Child. This study is not concerned with the relationship of Parent and Child but with guardianship when vested in someone other than the natural guardian, when the natural guardianship is contested and another seeks the guardianship, or when the natural parents are appointed guardians of the estate or are granted allowance for the maintenance of their children from the children's estates. The statutes devoted to the subject of Guardian and Ward are extremely brief in their treatment of this personal phase of guardianship,—a phase of particular interest and importance to social workers. Unless the letters of guardianship specify particularly that the appointment is for the person or for the estate alone, it is presumed to convey both relationships. The laws of some states do not mention the personal aspect of guardianship, and many more states devote only a short sentence to it. This neglect may be explained in two ways. Firstly, guardianship of the person is an intimate relationship, the circumstances of which necessarily vary with each individual case and like that of Parent and Child, does not lend itself easily to directions. Secondly, since this relationship existed under the common law, the statutes need not be as specific as for the sale of real estate. This latter, a purely statutory procedure, must bear jurisdictional prerequisites on its face. In its very nature, this relationship, substituted for that of Parent and Child, is an informal one. Yet, the unselfish love and devotion which may be expected to accompany the parental relation do not inherently exist for the protection of the interests of minors in this substitute relationship. Therefore, the fault with the law lies not in its brevity, but in its failure to provide the courts with an administrative procedure and staff designed and qualified to guarantee protection and guidance approximating that which is supposed to be given by natural guardians. According to the statutes, guardians and wards are under the supervision of the court, but this supervision is passive and operates retroactively. The attention of the court

must be sought by petition and then only after injury has been done. Except in a very few states, the statutes provide for court supervision over guardianship of the person only in connection with change of residence to another state and expenditures for support and education exceeding the ward's income. The second provision seems to be designed more for the protection of the estate than the supervision of the person. Only an investigation of actual administration could reveal what scrutiny courts give to the care and control exercised by guardians over wards.

The brevity of the statutory provisions for guardianship of the person will be evident from a summary. Florida, Georgia, North Carolina, and Texas make no reference to the duties of guardianship of the person. Connecticut,¹ Iowa,² and Kansas³ provide that the guardian of the person shall have the same powers as a sole surviving parent. Delaware⁴ and New Mexico⁵ give the guardians the "care of the person of the ward." Indiana,⁶ Nebraska,⁷ New York,⁸ and New Jersey⁹ provide only for "custody and tuition." Massachusetts,¹⁰ Idaho,¹¹ Maine,¹² Minnesota,¹³ Montana,¹⁴ North Dakota,¹⁵ Michigan,¹⁶ and South Dakota¹⁷ provide for the custody of the person and the care of the education. South Carolina¹⁸ statutes, while not specifying anything about guardianship of the person, imply custody when empowering the guardian to bring action for the recovery of his ward. Rhode Island¹⁹ statutes charge the guardian of the person to "take special charge of the education of his ward." Other states are slightly fuller in their descriptions of this office. Arkansas,²⁰ Missouri,²¹ Nevada,²² and Oregon²³ provide that the guardian be entitled "to the care, custody, and control of the person of his ward" and "to the care of his education, support and maintenance."

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| ¹ Sec. 4790. | ¹³ Sec. 8933. |
| ² Sec. 12574. | ¹⁴ Sec. 10407. |
| ³ Chap. 38, secs. 202, 209. | ¹⁵ Sec. 8880. |
| ⁴ Sec. 3090. | ¹⁶ Sec. 15770. |
| ⁵ Chap. 62, sec. 115. | ¹⁷ Sec. 3497. |
| ⁶ Sec. 3388. | ¹⁸ Sec. 5565. |
| ⁷ Chap. 38, sec. 108. | ¹⁹ Sec. 5680. |
| ⁸ Chap. 14, sec. 82. | ²⁰ Sec. 4175. |
| ⁹ p. 3826, sec. 38. | ²¹ Chap. 28, secs. 394, 402. |
| ¹⁰ Chap. 201, sec. 5. | ²² Secs. 9500, 9501. |
| ¹¹ Sec. 7848. | ²³ Chap. 11, secs. 1305, 1306. |
| ¹² Chap. 80, sec. 3. | |

Arizona,¹ Oklahoma,² and Utah³ provide for "custody and care of the education," and "custody of the ward," and state that the guardian must "look to his support, health, and education." The remaining states provide the guardian with custody, tuition, and education and make some additional provisions for the relationship. Ohio⁴ adds to "custody, maintenance, and education" the following duties: "protection and control of the person," "suitable maintenance," "maintenance and education as the estate justifies," and "obedience to the orders of the court." Kentucky⁵ gives the guardian custody of his ward and orders him to provide for the necessary and proper maintenance and education. Louisiana⁶ orders the guardian to regulate support and education so that nothing decent or necessary be wanting, according to the ward's condition and fortune. New Hampshire⁷ states that every guardian shall inculcate habits of sobriety and industry in his ward and may employ him in any suitable labor, or bind him out, by a written contract, but for a term not exceeding a year,—but a judge upon application by the minor, or any friend of the minor, shall have powers to rescind or modify the contract. Vermont⁸ law reads "except as otherwise provided, a guardian shall have custody and tuition, shall furnish his ward with suitable employment, provide for instruction in science or some trade or profession according to his circumstances."

Like a parent, a guardian of the person appears, prosecutes, and defends all civil actions in behalf of his ward unless a guardian ad litem is appointed for these special purposes. About half of the states provide for these powers in their statutory chapters on Guardian and Ward. Other provide for it elsewhere. Six states include in the laws on Guardian and Ward the authority given guardians of the person to bind out wards as apprentices. The other states place this provision in their statutes on Master and Servant, Apprenticeship, or elsewhere. Likewise, the power to give in adoption, to consent to marriage, and other parental powers are sometimes found in the laws on Guardian and Ward. More often the statutes on Adoption, etc. state that "parents or guardians" may perform these acts.

The court has jurisdiction over guardians and wards and can make such orders as it sees fit. This fact, however, is not

¹Sec. 4109.

²Sec. 6587.

³Sec. 7828.

⁴Sec. 10935.

⁵Sec. 2032.

⁶Secs. 337, 350.

⁷Chap. 289, sec. 19.

⁸Sec. 3645.

always written into the law. A number of states, however, make statements concerning the court in relation to the person of the ward. California¹ provides that, in the management of the person, a guardian may be regulated by the court. Both Colorado² and Illinois³ statutes read:

"Guardians shall educate their wards, and it is hereby made the duty of all civil officers to give information to the court of neglect or omission of any guardian to his ward. For the purpose of education and nurture, the guardian has power, under direction of the county court, to direct the same and for that purpose may pay out from the ward's money as the court directs, the rents and profits to be resorted to first.

"When there are not sufficient moneys to teach the ward to read and write and the ground rules of arithmetic and the guardian refuses or neglects to have him so educated, the court shall have power to put the ward out to any person for that purpose and for such cause remove the guardian."

The court in Missouri⁴ orders proper education, support, and maintenance according to the ward's means. Ohio⁵ demands the guardian to "obey the order of the court." In Pennsylvania,⁶ the "orphans court of each county has the care of the person of minors in that county." Tennessee⁷ and Mississippi⁸ state that the "court shall make orders for the education and maintenance." In Virginia,⁹ the circuit and corporation courts in chancery and in West Virginia,¹⁰ the chancery court may "make any order for the custody and tuition of an infant." In Washington,¹¹ the guardian of the person is "under the direction of the court at all times." The guardian in Wisconsin¹² must state in his annual accounts the

¹Probate Code of California (1931), secs. 1400, 1500.

²Secs. 5276, 5544.

³Chap. 64, sec. 4.

⁴Chap. 38, sec. 402.

⁵Sec. 10935.

⁶Sec. 1021.

⁷Sec. 8510.

⁸Sec. 1876.

⁹Sec. 5326.

¹⁰Chap. 44, Art. 10, sec. 43.

¹¹Secs. 9904, 9907.

¹²Chap. 319, sec. 11.

number of days his ward attended school. The court regulates the amount spent for support and education of wards in Louisiana¹ and determines, in the District of Columbia,² along with the accepting of the annual report, "the amounts to be expended annually in the maintenance and education of the infant, regard being had for his future condition and prospects, and the court, if it deems it advantageous to the ward, may allow the guardian to exceed the income and make use of the principal of the estate." Only these thirteen states specify particularly concerning the court's part in the supervision of the person of wards, with the exception of the provision in Arizona,³ California,⁴ North Dakota,⁵ and Wyoming⁶ to the effect that, when appointing a guardian, the court may insert further conditions, not otherwise obligatory, with the consent of the person appointed, providing for the care, treatment, education, and welfare of minors.

A few states make provisions in their statutes concerning the residence of the ward. Presumably wards reside with the guardians of their person. Natural guardians are free to fix the residence of their children as they wish, according to their convenience. Arizona,⁷ California,⁸ Oklahoma,⁹ and Utah¹⁰ in their statutory sections on "duties of the guardian of the person" provide that he must fix the ward's residence within the state and not without the state unless the court permits. Alabama¹¹ prohibits guardians from changing the ward's residence to another county without an order of the court and prohibits the court from giving the order except when such a removal will advance the interest of the ward. In order to remove a ward to another county, the guardian must file a written application setting forth the facts; the court then appoints a guardian ad litem to represent the ward and at a hearing the order is granted or refused. The

¹Sec. 350.

²p. 147, sec. 55.

³Sec. 4112.

⁴Probate Code of California (1931), sec. 1512.

⁵Sec. 8882.

⁶Sec. 7019.

⁷Sec. 4120.

⁸Probate Code of California (1931), sec. 1500.

⁹Sec. 6587.

¹⁰Title 102, chap. 13, sec. 31.

¹¹Secs. 8231, 33.

guardian's certified records are then ordered transferred and filed in the court of the county to which the ward is going. A guardian cannot remove his ward out of the state of Alabama without making a final settlement, after procedure similar to that for removal from the county. The court sends a transcript of records to the new state. Illinois¹ also requires a transfer of the files, records, etc., when a guardian removes his ward to another county within the state. The clerk of the court is directed to send a certified copy of the transfer to the court of the new county. All the states make provisions for removing property out of the state, but only these six consider residence in connection with "duties to the person." Such requirements as those of Alabama and Illinois may be imposed by the courts of other states in their supervision of guardianships but to insure this reasonable procedure and continuing supervision of guardians in another county or state, these requirements should be written into the laws of every state.

Expenditures.—A guardian is not liable for the support of his ward beyond the proceeds of the ward's own estate. The first source for support is the income or profits from the estate, the capital being preserved insofar as possible, for the ward at majority. When the income and profits prove insufficient, the personal and then the real estate may be drawn upon for maintenance and education but not without the approval or order of the court. The laws direct guardians and judges to have regard for the future condition and prospects of the ward in making allowances for support over the income. The statutes of several states say that the court may direct guardians to spend a specified sum for maintenance and education. Other states have statutes providing that the court shall determine the amount to be expended for support. What is used for support and education depends upon the size of the income and estate and upon the standard of living of the family with whom the ward makes his home. The allowance is probably variable where the guardians of the person and the estate are vested in the same person, and it is probably a set sum when the offices are separate. Even when living with his own parents who are legally responsible for his support, the guardian of the estate may be ordered by the court to allow expenses out of the ward's estate. In the intimate relationship of daily life, the guardian, like the child's own father, is supposed to have the best interests of his ward in mind and exercise an unselfish judgment in these matters which by their very nature must escape

¹Chap. 64, sec. 40.

close supervision by a court or outside agency.

The degree of supervision by the courts and the care devoted to providing necessary maintenance on the one hand and preserving the estate on the other, cannot be learned from the statutes. At the annual or periodical settlements, the court has an opportunity to review the amount of income spent for current needs and the amount invested. When the body of the estate is encroached upon, the court is able to determine these appropriations in advance. In some states, guardians may be credited at the annual settlement for reasonable advances of money beyond the income; in other states, expenditures beyond the income of one year, if justifiable, may be charged on the following year's account. If a guardian fails to provide proper support out of the ward's income or estate, he may be forced to do so and if, during his failure to do so, some third person assumes this responsibility, reimbursement out of the estate may be ordered by the court. At any time, interested persons may complain to the court of mismanagement of the estate or neglect of the ward. This safeguard against mismanagement or neglect is insufficient and unsatisfactory because many persons may hesitate to interfere and personal factors may be involved in complaints.

The statutes concerning guardians and wards of all the states imply or express that the income of the estate should be the first source for maintenance and education of wards. The states which express this direction do so in several ways. Arizona,¹ Utah,² and Wisconsin³ direct guardians to apply the income and profits to the maintenance and education of wards. Nebraska⁴ and Vermont⁵ direct them to provide maintenance out of the income of the estate. Louisiana⁶ law says that "expenses ought never to exceed revenues." Kentucky,⁷ Nevada,⁸ and New Mexico⁹ statutes provide that expenditures for maintenance and education not exceed the income except when authorized by the court. Virginia¹⁰ and West Virginia¹¹ make the same provision but include permission given by the will. Their statutes read:

"No disbursement shall be allowed any guardian, where the deed or will under which the estate is derived, does not

¹Sec. 4126

⁷Sec. 2034.

²Sec. 7830.

⁸Sec. 9506.

³Chap. 319, sec. 26.

⁹Chap. 62, sec. 114.

⁴Chap. 38, sec. 503.

¹⁰Sec. 5321.

⁵Sec. 367.

¹¹Chap. 44, Art. 10, sec. 3.

⁶Louisiana Code of Civil Practice. Dart (1932), Art. 350.

authorize it, beyond the annual income, until the court before which the accounts are settled, shall authorize and they shall not be authorized unless the court considers it judicious and proper."

Arkansas,¹ Delaware,² and New Jersey³ (upon petition) provide "the court may direct a guardian to spend for maintenance and education a specified sum which may be more than the income but without which a guardian can use only the income." Mississippi⁴ provides that the court may fix the sum for maintenance and education, with regard for the station, future prospects, and destination of the ward.

The District of Columbia⁵ statute provides that:
"the court shall determine the amount to be expended of maintenance and education, regard being had for the future condition and prospects of the ward, and shall allow it to exceed income."

The Probate Court of Missouri⁶ "shall order proper maintenance according to means."

North Carolina⁷ and Tennessee⁸ laws provide that:
"every guardian may charge in the annual accounts all reasonable disbursements and expenditures suitable to the degree and circumstances of ward and if it is shown that he has really disbursed more in one year than profits for education and maintenance (or if they exceed income) in one year and are reasonable, they may be charged to another year."

Delaware,⁹ Maryland,¹⁰ North Carolina,¹¹ and other states permit guardians to cut and sell wood and timber and apply this income to the maintenance and education of their wards.

¹Sec. 4193.

²Sec. 3955.

³Supplement (1925-1930), chap. 86, sec. 2a.

⁴Sec. 1876.

⁵Sec. 1135.

⁶Chap. 38, sec. 402.

⁷Sec. 2189.

⁸Secs. 8515, 8519.

⁹Sec. 3925.

¹⁰Art. 93, sec. 165.

¹¹Sec. 2174.

Arizona,¹ Idaho,² Minnesota,³ Montana,⁴ North Dakota,⁵ Oklahoma,⁶ South Dakota,⁷ and Wyoming⁸ statutes contain the following section:

"When a guardian has advanced for the necessary maintenance support or education of his ward, an amount not disproportionate to the value of his estate or his condition in life and the same is made to appear to the satisfaction of the court by proper vouchers and proofs, the guardian must be allowed credit therefore in his settlements. Whenever a guardian fails, neglects, or refuses to furnish suitable and necessary maintenance support or education for his ward, the court may order him to do so and enforce such order by proper process. Whenever any third person, at his request, supplies a ward with such suitable maintenance, support and education and it is shown to have been done after the refusal or neglect of the guardian to supply the same, the court may direct the guardian to pay therefor out of the estate and enforce such payment by due process."

California⁹ statutes include the first provision of this section but omit the clauses regarding the enforcement or reimbursement of third persons. Arizona¹⁰ statutes include only the first two clauses.

A law in Michigan¹¹ permits expenses incurred by any county in the care, support or maintenance of a ward, upon the approval of the judge, to be allowed out of the personal estate and with a license, out of the real estate.

While a legal guardian is not liable for the support of his ward except from the ward's own income or estate, a parent is legally responsible for the maintenance and education of his child, whether the child has a separate estate or not. Some states, however, make a special provision for wards with estates who live with their own parents. Idaho,¹² Maine,¹³ Massachusetts,¹⁴ Michigan,¹⁵ Minnesota,¹⁶ Mississippi,¹⁷ Montana,¹⁸ Nebraska,¹⁹

¹Sec. 3127.

²Sec. 7863.

³Sec. 8939.

⁴Sec. 10423.

⁵Sec. 8894.

⁶Sec. 1456.

⁷Sec. 3526.

⁸Sec. 7027.

⁹Sec. 1502.

¹⁰Sec. 4127.

¹¹Sec. 1042.

¹²Sec. 7852.

¹³Chap. 80, sec. 16.

¹⁴Chap. 201, sec. 41.

¹⁵Sec. 15771.

¹⁶Sec. 8935.

¹⁷Sec. 1877.

¹⁸Sec. 10409.

¹⁹Chap. 38, sec. 111.

Nevada,¹ New Jersey,² North Dakota,³ Utah,⁴ and Wyoming⁵ provide:

"If a ward has an estate and income which would permit his living and being educated better than his father can afford, regard being given to the father's family and to all circumstances in the case, the ward's expenses may come from his income as the court allows."

The reasonableness of this provision is evident. Minority is the period for education and training, and it is better to prepare a child for the future than to preserve an estate from which a child of lesser opportunity could obtain less permanent benefit.

Although, in general, guardians are supposed to limit expenditures to the amount of the income and profits of a ward's estate, without a court order, this rule is not strictly adhered to. In some states, the rule may be stated as follows: "expenditures in excess of income will not be allowed unless good reason is shown to the court why the court was not applied to in advance."⁶ A New York decision states that the court may approve expenditures from the principal of the estate without the guardian having first secured permission, the test being whether the expenditures without the consent of the court the guardian acted in good faith and with reasonable discretion.⁷ Extravagant expenditures will not be allowed.⁸ Whether the expenditures were extravagant is presumably determined in relation to the size of the estate and the social position of the ward.

When the estate is completely exhausted, several possibilities exist. The ward may have endeared himself to his guardian who will henceforth provide for him. If the ward is old enough, he may go to work and be self-supporting. If he is too young the guardian may place the ward with a charitable institution or agency. The statutes frequently provide for the alternative of apprenticeship but this means is infrequently resorted to at the present time. The guardian is not liable for the support and

¹Sec. 10409.

²Chap. 86, sec. 19a.

³Sec. 8883.

⁴Sec. 7814.

⁵Sec. 7021.

⁶Madden, Domestic Relations, p. 479; In re Boyes' Estate, 151 Cal. 143 (1907); Calhoun v. Calhoun, 41 Ala. 359 (1868).

⁷In re Lapides, 258 N. Y. S. 799 (1932).

⁸In re Mells, 64 Iowa 391 (1884).

education of his ward unless he has voluntarily placed himself in loco parentis,¹ or has promised not to demand compensation for tuition, board and clothing,² or has cared for the ward in his own family without any apparent expectation.³

Because no one is responsible for the support and education of the ward except as it is supplied by the ward's own estate, it is particularly important that his estate be used with greatest care and distributed throughout the period of minority or dependency. The disposition of the estate should be made with regard to the length of time before the ward can be expected to be self-supporting. The educational program laid down in the plan should be adapted to his mental and physical endowments and inclinations, as well as the size of the estate. Are there facilities in probate courts for making and carrying out such plans for wards? Can a busy judge take time and does he have sufficient information at hand to make wise orders for the expenditures for support and education? Each guardianship presents individual problems and can only be directed intelligently on an individualized social case work basis by someone who has studied the personal, social, and material factors involved. Supervision of the person is essential regardless of the size of the estate. Particularly for wards with only small estates, the protection and distribution of that estate over the years when it is most needed is absolutely necessary to the performance of the duty of the state.

To accomplish this, the first step might be the enactment of requirements for annual accountings and a budget including regular items. The budget should be approved in advance rather than after expenditures have been made. It is rather difficult to refuse allowance for expenditures over three preceding years when they have apparently been made in good faith but nevertheless with poor judgment. It is especially difficult when no supervision has been given the guardian in making these expenditures. The possibility of an interested person making complaint of neglect of the person or of great extravagance is an insufficient protection to the ward, if the state assumes its proper authority or performs its duty to minors.

¹Spring v. Woodworth, 9 Allen 326 (1862).

²Bradford v. Bodfish, 39 Iowa 691 (1874).

³Folger v. Heidel, 60 Mo. 284 (1875); Horton's Appeal, 94 Pa. St. 62 (1880).

Guardianship of the Estate

Guardianship of the estate of a minor is necessary; intelligent and prudent guardianship of the estate is indispensable to public welfare. Without a guardian, an estate left to an infant would remain tied up during the period of infancy, since infants are neither personally nor legally competent to transact business. Such a state of affairs would handicap the normal course of business. The proper conservation and utilization of a ward's own funds is to the public's interest. Since guardians are not legally responsible for the support of wards as parents are of children, the ward's estate is required to keep him from becoming a public charge. The social aspects of guardianship of the estate are far more important than its convenience to the business man and its economy to the state. The use of the income and, on occasion, the expenditure of the principal of the estate are necessary for the support and education of the ward. Only thus can the fullest physical, mental, and social development of the child be attained. Wise social decisions are called for in these matters. The financial resources should be conserved, changes in the holdings and sales of the property should be judiciously foreseen and arranged, and the management of the estate should take the long view. At the same time, the plan of the child's life depends in large measure upon his financial resources and the guardian of the estate cannot concern himself solely with business transactions. Social guidance is essential in the performance of his duty.

The powers and duties of the guardian of the estate are very similar to those of executors and administrators.¹ Both are treated in many respects like trustees, holding a legal but not a beneficial control of the property in their custody. Both have an authority coupled with an interest.² The guardian's trust is one of obligation and duty, not of speculation and profit.³ In the administration of the estate, a guardian is required to exercise the same care and prudence and diligence that a reasonable person would use in his own affairs.⁴ Guardians in managing their ward's estates should act only under the authority of the court having jurisdiction.

¹Colorado, for instance, does not treat executors, administrators, guardians, and conservators separately in her statutes.

²Woerner, American Laws of Guardianship (1897), p. 172.

³Kent, Commentaries on American Law, II, 229.

⁴In re Marchand's Guardianship, 137 Ore. 444 (1931)

Guardianship of the estate is treated more fully in the statutes than guardianship of the person. Throughout history, emphasis has been placed on the preservation of the estate. The legal procedures involved in administering the estate, such as the investment of moneys and the leasing, mortgaging, and selling of real estate, lend themselves more readily to particular directions than does the care of the person. Furthermore, persons entering upon transactions with guardians would naturally demand legislation which would guarantee the validity of their acts. Regardless of the particular statutory directions, however, guardianship of the estate cannot be more carefully supervised than the quality of personnel assisting the court permits.

Expenditures for maintenance and education of wards involve the administration of the estate as well as the care of the person. The statutes concerning expenditures employ general terms in the same manner as do those concerning custody of the person. Such directions for expenditures as "suitable," "expedient," "necessary," "in accord with conditions and circumstances," require interpretation in each individual case. Individualized interpretation of the necessity or expedience of investments and sales of real estate is also needed. Notwithstanding the abundance of details in the statutes as to procedures for administration of the estate, there is no provision for supplying the court with objective information to enable it to decide whether the granting of orders for investments, mortgages, sales, and the like, are consistent with the best interests of the ward.

A guardian of the estate holds a controlling but not a beneficial interest in the property of his ward. The right of possession is in the guardian so that he, not the ward, can maintain actions of trespass. The guardian must sue in his own name for any injury to the possession, but in the name of the ward for any right of the ward. The guardian's possession, as well as all his acts in connection with it, must be for the ward's and not for the guardian's interest.

Duties of the Guardian.—The statutes of twenty-one states devote one or two sections to general directions concerning the management of the estate. From the very nature of guardianship and from the regulations set up in other sections in these and other states, the general policy set forth below can be assumed to operate in all the states whether expressed or not. The following section is the one most frequently found.

"A guardian shall manage (or handle) the estate frugally (or economically) and without waste, apply income and profits as far as necessary for the comfortable and suitable maintenance and support of the ward; and if insufficient, personal

and real property may be sold upon an order of the court." This section is found in the statutes of Alabama,¹ Arizona,² California,³ Illinois,⁴ Idaho,⁵ Maine,⁶ Massachusetts,⁷ Michigan,⁸ Minnesota,⁹ Montana,¹⁰ Nebraska,¹¹ New Hampshire,¹² Oklahoma,¹³ Oregon,¹⁴ Rhode Island,¹⁵ South Dakota,¹⁶ Utah,¹⁷ Vermont,¹⁸ Wisconsin,¹⁹ and Wyoming.²⁰ Arizona,²¹ and Oklahoma²² laws contain an additional section:

"A guardian shall keep safely and not permit any unnecessary waste or destruction of real property, nor sell without order of the court, but shall, so far as in his power, maintain the property out of its income and deliver it to the ward at the close of guardianship in as good condition as he received it."

Utah²³ laws contain a similar section:

"The guardian must not permit any unnecessary waste or destruction of real property, must maintain same buildings and appurtenances out of its income and deliver it to the ward at the close of guardianship in as good condition as he found it, natural wear and tear excepted."

Indiana²⁴ laws state more briefly that "the guardian shall manage the estate for the best interest of the ward."

More specific duties are listed in the statutes of many

¹Sec. 8419.

¹⁸Sec. 3676.

²Sec. 4126.

¹⁹Chap. 319, sec. 26.

³Sec. 1502.

²⁰Sec. 7026.

⁴Chap. 64, sec. 19.

²¹Sec. 4126.

⁵Sec. 7862.

²²Sec. 6588.

⁶Chap. 80, sec. 15.

²³Sec. 7829.

⁷Chap. 201, sec. 38.

²⁴Sec. 3390.

⁸Sec. 15784.

⁹Sec. 8938.

¹⁰Sec. 10419.

¹¹Chap. 38, sec. 503.

¹²Chap. 289, sec. 3.

¹³Sec. 1455.

¹⁴Chap. 11, sec. 1319.

¹⁵Sec. 5681.

¹⁶Sec. 3525.

¹⁷Sec. 7830.

states.¹ One or more of the following duties are included in the sections listed below: receive and take possession of the estate, compromise (or compound with the court's approval) debts, pay (just) debts, collect accounts, demand and sue for, prosecute and defend ward in all actions, represent ward in all legal suits (litigation), employ counsel for, protect rights of, maintain actions for injury, etc. Maine² provides that the judge may appoint an arbitrator for the compromise of debts and controversies. Missouri directs guardians to renew obligations for debts and pay off mortgages on homesteads;³ Louisiana⁴ provides that guardians accept legacies and in New Orleans insure the houses of wards. Although judges may appoint guardians ad litem to represent wards (see guardians ad litem, p.59), five states, Idaho,⁵ Massachusetts,⁶ Michigan,⁷ Minnesota,⁸ and Nebraska⁹ provide, in connection with the duty of representing wards in litigation that guardians perform this function unless guardians ad litem are appointed.

The duty and authority of the guardian of the estate to join in and assent to partition probably exist in all the states. This function is specified in the statutes of the following states:

¹Alabama, secs. 8164-8167; Arizona, secs. 4125, 8150; Colorado, secs. 5262, 5272; Delaware, sec. 3090; Idaho, sec. 7860. Illinois, chap. 64, sec. 17; Iowa, sec. 12581; Kansas, chap. 38, sec. 210; Kentucky, sec. 2030; Maine, chap. 80, secs. 17, 21; Massachusetts, chap. 201, sec. 37; Michigan, secs. 15781, 15782; Minnesota, sec. 8937; Missouri, sec. 402; Montana, secs. 10417-8; Nebraska, chap. 38, secs. 501, 502; New Hampshire, chap. 289, sec. 3, 27; New Mexico, chap. 62, sec. 115; North Carolina, sec. 2169; North Dakota, sec. 8892; Ohio, sec. 10933; South Dakota, secs. 3523, 3524; Tennessee, secs. 8489, 8490; Utah, secs. 7831, 7832; Wisconsin, chap. 319, sec. 25; Wyoming, secs. 7024, 7025.

²Chap. 80, sec. 21.

³Secs. 403, 419.

⁴Secs. 354, 355.

⁵Sec. 7860.

⁶Chap. 201, sec. 37.

⁷Sec. 15782.

⁸Sec. 8937.

⁹Chap. 38, sec. 502.

Arizona,¹ California,² Connecticut,³ Idaho,⁴ Maine,⁵ Michigan,⁶ Nebraska,⁷ South Dakota,⁸ Utah,⁹ Wisconsin,¹⁰ and Wyoming.¹¹ Indiana¹² and Minnesota¹³ include this duty in their statutes with further provisions that it be done under the direction of or with the approval of the court, upon petition. Permission of the court may or may not be necessary in the other states. Massachusetts¹⁴ requires the appointment of a guardian ad litem, if the guardian is personally interested in the partition. The Louisiana statute reads:

"When two or more persons, some or all of whom are minors, hold property in common, and it is the wish of the co-owners, or if minors, or tutors, on advice of a family meeting duly held and convened according to law to represent minors, the whole or the property may be sold at a private sale for its appraised value, said appraisement to be made and the terms of said sale to be fixed by the family meeting duly convened for that purpose. The co-owners may purchase the entire interest of the minors. The proceedings of the family meeting are to be approved and homologated by the judge of the Dist. Ct. of the parish in which the minor resides. In case the minors are absent and not represented by their tutor or tutors, the judge may appoint any responsible person making application therefor by petition, to represent the minor, with necessity of holding a family meeting to advise and consent thereto, said curator to act without bond. The judge may in like manner appoint an under-tutor or curator."¹⁵

¹Sec. 4128.

²Probate Code of California (1931), sec. 793.

³Sec. 4808.

⁴Sec. 7864.

⁵Chap. 80, sec. 18.

⁶Sec. 15784.

⁷Chap. 38, sec. 504.

⁸Sec. 3527.

⁹Sec. 7835.

¹⁰Chap. 319, sec. 27.

¹¹Sec. 7028.

¹²Sec. 3408.

¹³Sec. 8945.

¹⁴Chap. 201, sec. 39.

¹⁵Louisiana, Acts of 1924, Act No. 221.

Management of the Personal Estate.—The guardian has necessarily a more unlimited control over personal property than over realty. In the absence of statutes limiting his powers, the guardian has, as incidental to his office and duties, the power to sell personalty, and he may do so without an order of the court except in those states where a court order is required by statute. The personal estate may be invested, called in, reinvested and changed as the exigencies of the trust, in the judgment of the guardian, may seem to require. The laws frequently provide that when the income from the estate and the personal estate prove insufficient for support and education, the guardian may petition the court to sell part or all of the real estate. Except for the provisions relating to investments, the statutes are, in general, silent about the management of the personal estate. The general statutes which direct the guardian to "manage the estate frugally and without waste" apply to personalty as well as other estate.

Personalty can be exchanged for realty by the guardian without a court order unless one is specifically required by statute.¹ The exchange of realty to personalty, however, can be made only with the approval of the court,² unless this power has been conferred on the guardian by will.³ The purchaser of a ward's personal estate acquires good title unless he is aware of fraudulent intent on the part of the guardian.⁴ No title will be acquired when there is a total lack of consideration in the transaction.⁵

Investments.—It is the duty of the guardian to invest the available funds of the ward. The surplus income over what is needed for maintenance and education, money which may come from leasing or selling real estate, and money from the sale of securities, stocks, and other personalty make up the estate which is available for investment. Many states give directions for investment in their statutes. Directions and limitations may also be named in the last will and testament. If the laws of the state require it, the guardian must obtain a court order before making investments. In the absence of a statute requiring it, it is not necessary to obtain the sanction of the court before making a loan or other investment. If, however, the guardian

¹Freeman v. Wilson, 74 N.C. 549 (1876)

²Morgan v. Johnson, 68 Ill. 190 (1873).

³Thurmond v. Faith, 69 Ga. 832 (1883).

⁴White v. Nesbit, 21 La. Ann. 600 (1869).

⁵Schmidt v. McBean, 98 Ill. App. 421 (1881).

obtains an order of the court, he is protected from any loss not caused by subsequent negligence or malfeasance,¹ and will not be subject to attack by the ward upon reaching majority.² When a guardian acts without an order, he is held to stricter accountability.³

The investment of money carries an obligation of extreme care, for the guardian is managing, not his own affairs, but the affairs of one who is unable to act for himself and who is dependent upon the estate for maintenance and education. The guardian is bound to act honestly and faithfully and exercise a sound discretion such as men of ordinary prudence and intelligence use in their own affairs.⁴ A mere error in judgment is not sufficient to subject a guardian to liability,⁵ but stupid investments made through ignorance are, as well as fraudulent ones, a cause for removal. All investments are subject to judicial scrutiny at the time of periodical settlements. The final authority rests with the court, which, however, must be guided and informed by the guardian who is more familiar with the condition and prospects of the particular estate than the court can be. Guardians are subject to removal for mismanagement, and this may become known to the court through absurd petitions for investment, review of periodical accounts, or complaints brought by interested persons. Some states provide that a guardian is not liable for loss incurred without fault. Such protection is reasonable and did it not exist, persons could not afford to assume the responsibilities of the office.

Some states provide that the guardian may invest the funds of the ward. Others provide that he may do so with the approval of the court. Some states name the length of time before the guardian becomes liable for the interest of uninvested funds. A few states name the penalty for negligence to invest. Some states specify in their statutes certain investments which are approved and in which guardians may invest money without liability to themselves, other investments which are prohibited, and still other kinds which may or may not be acceptable. The remaining

¹In re Carver, 118 Cal. 73, 50 P. 22 (1897); Baldy v. Hunter, 98 Ga. 170 (1896).

²Nagle v. Robins, 9 Wyoming 211. 62 P. 154 (1900).

³Osborne v. Monroe, 43 N.J. Eq. 248 (1887).

⁴In re Carver, 118 Cal 73 (1897); Burwell v. Burwell, 78 Va. 574 (1884).

⁵Cousin's Estate, 11 Cal. 441 (1896).

laws which relate to investments concern banks and trust companies which act as guardians.

The investment of funds is one of the duties of the guardian of the estate. Arkansas,¹ Delaware,² Florida,³ Michigan,⁴ New Jersey,⁵ New Mexico,⁶ Utah,⁷ and Wyoming⁸ prescribe by law that guardians invest or loan money with the approval of the court. Minnesota⁹ and Nebraska¹⁰ provide that upon petition of the guardian, the court may order investments. Amounting to the same thing, perhaps, is the Indiana¹¹ statute which provides that, upon the guardian's application, the court may order changes in the investments. In Rhode Island,¹² a guardian "may be authorized" to invest extra moneys. With the approval of the judge, guardians in New Hampshire¹³ may continue investments as they were received. This may imply that a court order is necessary for changing investments. The surety on investments must be approved by the court in Tennessee.¹⁴

It can be reasonably assumed that the court of any state could penalize a guardian for neglecting to invest money to the ward's advantage, on the grounds of not doing his duty properly. It might also claim an authority based on the court's general supervisory capacity over guardians and wards. Some of the states, however, name in their statutes a liability for not investing money on hand and some of them specify the time allowed before interest rates will become chargeable to the guardian. Arkansas,¹⁵ Illinois,¹⁶ Missouri,¹⁷ and New Mexico¹⁸ statutes merely state that if the guardian fails to invest the funds of his ward he is accountable or liable for the interest. Missouri goes farther and states that he is liable for removal from his office for this neglect. Louisiana¹⁹ guardians are bound to invest in the name of the ward the revenues which exceed expenses if they amount to \$500.00 and must pay interest if they default. Kentucky²⁰

¹Sec. 4205.

²Sec. 3926.

³Sec. 5893.

⁴Sec. 15786.

⁵Supplement, 1910-1925,
chap. 86, sec. 32a.

⁶Chap. 62, sec. 119.

⁷Sec. 7341.

⁸Sec. 7048.

⁹Sec. 8947.

¹⁰Chap. 38, sec. 506.

¹¹Sec. 3391.

¹²Sec. 5685.

¹³Chap. 290, sec. 20.

¹⁴Sec. 8496.

¹⁵Sec. 4206.

¹⁶Chap. 64, sec. 22.

¹⁷Chap. 38, sec. 418.

¹⁸Chap. 62, sec. 120.

¹⁹Sec. 347.

²⁰Sec. 2035.

prescribes that if a balance is owing by the guardian at the end of any year, counting from the time of his appointment, which ought to have been loaned out or invested, he shall be charged with interest from the end of that year at rates of 5 per cent under \$5,000.00 and 4 per cent over \$5,000.00. The Ohio¹ statute prescribes that the guardian invest within a reasonable time after receiving money. Tennessee² allows a guardian four months to make investments and after that time charges him six per cent as the court may determine. If a guardian in Texas³ neglects to invest or loan surplus money when he can do so with reasonable diligence, he shall be liable for the principal and also the highest legal rate of interest during the period of negligence. Virginia⁴ allows sixty days to invest or loan, and the guardian is charged compound interest on any balance due or on hand at the end of any year which ought to have been loaned and is not. West Virginia⁵ allows sixty days for investing funds and states that the guardian shall not be charged interest during that time, but after that time he is liable for interest, not compound interest.

Delaware⁶ does not prescribe when money must be loaned or fix the guardian's liability, but implies liability by stating that if money cannot be lent, the guardian does not have to pay interest. Florida⁷ states that if money cannot be lent the guardian is liable only for the principal. While West Virginia⁸ allows a guardian only sixty days for making investments, the law provides that if he is unable to loan it, he shall apply to the court and while hearing is pending he shall not be charged interest unless the judge or court orders otherwise.

Some of the states name specifically certain investments which are approved and in which guardians may invest the money of wards without liability to themselves. These investments are

¹Sec. 19033.

²Sec. 8499.

³Sec. 4189. In Harston v. Barton, 43 S. W. (2d) 630 (Texas, 1931), a guardian who negligently failed to make an effort to loan his ward's money was held chargeable with interest at 10 per cent until the ward attained majority and 6 per cent afterwards.

⁴Sec. 5325.

⁵Chap. 44, Art. 10, secs. 10, 12.

⁶Sec. 3926.

⁷Sec. 5893.

⁸Chap. 44, Art. 10, sec. 12.

in United States, Federal Farm Loan, and Liberty Bonds, state, county and municipal bonds, and bonds of other political districts. Colorado,¹ Delaware,² Florida,³ Illinois,⁴ Missouri,⁵ Ohio,⁶ Rhode Island,⁷ South Carolina,⁸ and Tennessee⁹ name United States and bonds of their respective states. Florida permits bonds of any state. Illinois defines state bonds as those issued not in aid of railroads, and Colorado limits guardians to bonds that are a direct general obligation of the state. Wyoming¹⁰ names U. S. bonds and Liberty Loan bonds, but omits state bonds. Missouri, South Carolina, Tennessee, and Wyoming also include Federal Farm Loan Bonds. Other bonds named by Colorado are those of counties, cities, or school districts which have been incorporated for fifteen years. Illinois includes county bonds. Ohio names bonds of counties or cities within the state. Municipal bonds are listed in Rhode Island. Bonds of any political division of South Carolina approved by the court are permitted by the statute of that state. Tennessee names bonds of any county, city or town in Tennessee.

Only five states provide specifically in their statutes for investment in real estate. Alabama¹¹ statutes provide that guardians may invest in real estate but make them liable for defects in titles. Ohio¹² and Pennsylvania¹³ permit investment in productive real estate with the approval of the court. Rhode Island¹⁴ and Wyoming¹⁵ also allow investment in real estate with the authorization of the court. It is generally held that a court order is necessary to convert personalty into real property.¹⁶

Eight states list real estate mortgages in their statutes as acceptable investments for the money of wards. Second mortgages,

¹Sec. 5269.

²Sec. 3926.

³Sec. 5893.

⁴Chap. 64, sec. 22.

⁵Chap. 38, sec. 418.

⁶Sec. 10933.

⁷Sec. 5685.

⁸Secs. 5461, 5462.

⁹Secs. 8497, 8498.

¹⁰Secs. 7048, 7049.

¹¹Secs. 8168-8170.

¹²Sec. 10933.

¹³Title 20, secs. 801-806.

¹⁴Sec. 5685.

¹⁵Sec. 7048.

¹⁶21 Encyclopedia of Law
and Procedure, p. 91.

however, are not allowed by statutes or courts.¹ Arkansas² allows guardians to loan at the highest prevailing rate in the community on unencumbered real estate to an amount not more than one-half the value. Colorado³ allows investments in first mortgage securities for periods not over five years or beyond the majority of the ward. Illinois⁴ and Missouri⁵ permit loans on first mortgages but do not name the limits of the amount. Tennessee⁶ makes the same provision if the real estate has been appraised, valued, and reported by three disinterested persons appointed by the court where the land lies, approved by the court, and in property in which the guardian is not interested. New Hampshire⁷ and Ohio⁸ permit the same investments but require the real estate security to be double the value of the loan. Florida⁹ provides that in loans on mortgages, if bona fide security be taken and it proves insufficient, the loss shall be the infant's loss.

Florida allows money to be put out at interest on private security, but such loans cannot be made for a longer time than one year. Missouri¹⁰ permits loans at interest on private security, if the amount of the loan is less than \$300.00. Only these two states mention loans on private security in their statutes. Many states provide for loans made with security satisfactory to the court, and courts may permit loans on private security. It has been held, however, in Alabama,¹¹ that a loan of a ward's money upon no other security than the note of the borrower, no matter how undoubted his solvency and credit, is unauthorized and the ward may elect to treat it as a conversion or ratify it. It has been held in Iowa¹² and elsewhere, that to

¹National Surety Company v. Manhattan Mortgage Company, 174 N. Y. S.9(1919); Huso v. Jasper, 48 N. D. 102, 183 N. W. 366 (1921).

²Sec. 4207.

³Sec. 5269.

⁴Chap. 64, sec. 22.

⁵Chap. 38, sec. 418.

⁶Sec. 4896.

⁷New Hampshire, Laws of 1931 amending chap. 71, sec. 22.

⁸Sec. 10933.

⁹Sec. 5893.

¹⁰Sec. 418.

¹¹May v. Duke, 61 Ala. 53 (1878).

¹²In re Stude's Estate, 179 Iowa 785, 162 N. W. 10 (1917).

invest guardianship property in trade or speculation is a breach of the guardian's duty to the ward.

The management of the personal estate probably offers the greatest opportunity for negligence and embezzlement, and therefore it should be carefully supervised. If no approval of the court is required for investing money and changing the personality, certainly careful scrutiny should be given the investments at the time the periodical accounts are examined and audited.

The estates of minors are frequently left in trust and administered by trust companies. Allusion to this disposition is not often found in the "Guardian and Ward" statutes. When it is found, it is accompanied by a reference to the laws on trusts, which are not included in this study. Banks and trust companies are also frequently appointed guardians of the estate. In this capacity, they are subject to the same regulations as other guardians in the administration of guardianship estates. Individual guardians are permitted to use these companies in their administration of the estate. In California,¹ a guardian may deposit money in banks within the state and be discharged from further care and responsibility until it is withdrawn by him. Personal assets may be deposited with a trust company and the bond of the guardian reduced. Rhode Island lists "deposit in a trust and savings bank" among the approved investments for guardians.² The courts of other states permit guardianship funds to be deposited in banks. It is proper for the guardian to deposit money in banks in the name of the ward and not in his own name.

Leasing Real Estate.—The common law rule whereby guardians in socage could lease the lands of the ward is embodied in the statutes of many states. Except where an order of the court is required by statute a general guardian regularly appointed and qualified may, without a court order, lease the lands of his ward during the period of guardianship, or a shorter time.³ In some jurisdictions, this rule has been changed by statutes requiring guardians to obtain special authority from the court.⁴ Some states

¹Probate Code of California (1931), secs.1513, 1514.

²Sec. 5685.

³Palmer v. Chesebory, 55 Conn. 114 (1887); McCoy v. Ferguson, 172 Ky. 235 (1916); Hutchins v. Dresser, 26 Me. 76 (1846); Richardson v. Richardson, 49 Mo. 29 (1871).

⁴Field v. Herrick, 5 Ill. App. 54 (1879); Easton v. Somerville, 111 Iowa 164 (1900); Charles v. Witt, 88 Kan. 484 (1913).

omit the matter of leasing,¹ and others merely list it along with other duties.² The duty of managing the estate which is given by law in every state,—no doubt covers this power to lease lands, and the procedure and supervision is, to some extent, determined by the court having jurisdiction.

The length of time for which leases may be made varies among the states. The statutes of some states provide that the term of the lease be determined by the court. Others leave the decision with the court but add that it not extend beyond the ward's majority. What ever the period allowed, majority, the time of maturity of the crops in the year of majority, or one year beyond majority is usually stated as the time limit on leases. Alabama³ and Arizona⁴ allow ten years, Kentucky,⁵ seven years, Colorado⁶ and Wisconsin⁷ five years, and Maryland,⁸ Mississippi,⁹ North Carolina,¹⁰ Ohio,¹¹ and Idaho,¹² three years. Mississippi permits an extension on the three year lease but not beyond six years. Land in Alabama¹³ may be leased annually without the court's taking action of the lease, but annual leases must be reported and a duplicate copy of the lease recorded within thirty days. Arkansas¹⁴ provides that "improved lands" be leased annually; unimproved or "wild" lands may be leased for longer terms but not for more than two years beyond majority. New Mexico¹⁵ has the same provision but limits leases of unimproved lands to one year beyond majority.

¹Indiana, Michigan, Nebraska, Nevada, New Jersey, North Dakota, Pennsylvania, South Dakota, and South Carolina.

²Sec. 12581.

³Secs. 8152-8154.

⁴Sec. 4158.

⁵Sec. 2031.

⁶Sec. 5270.

⁷Chap. 296, sec. 21.

⁸Chap. 93, sec. 166.

⁹Sec. 1878.

¹⁰Sec. 2172.

¹¹Sec. 19061.

¹²Secs. 7668, 7671, 7672.

¹³Secs. 8152-8154.

¹⁴Secs. 4187, 4189.

¹⁵Chap. 62, secs. 112, 113.

The procedure necessary for leasing is similar to that for selling real estate, when a court order is required. The guardian petitions the court giving the facts,—a description of the land, the advantages, the names of heirs, and the terms of the lease. Notice to appear is sent to interested persons and publication is made in the local paper, or advertisement is made by posting in public places. At the hearing the petition is examined and an order to lease is granted or refused. The court order specifies the terms, period, minimum rental, etc. The courts of some states appoint two or three disinterested freeholders to appraise the land and agree upon a fair rental value. Alabama,¹ Kentucky,² and West Virginia³ require the court to appoint guardians ad litem to represent the wards at the hearing. This may be done in other states if the judge sees fit. The states which specify this procedure in their statutes are Alabama,⁴ Arizona,⁵ California,⁶ Connecticut,⁷ Idaho,⁸ Kentucky,⁹ Minnesota,¹⁰ Missouri,¹¹ Montana,¹² New Hampshire,¹³ Ohio,¹⁴ Washington,¹⁵ and West Virginia.¹⁶ Colorado,¹⁷ Delaware,¹⁸ the District of Columbia,¹⁹ Illinois,²⁰

¹Secs. 8152-54.

²Secs. 2031, 2031a-2035.

³Chap. 37, Art. 1, secs. 2, 3.

⁴Secs. 8152-54.

⁵Secs. 2157, 4158.

⁶Probate Code of California (1931), sec. 840.

⁷Sec. 4803.

⁸Secs. 7668-72.

⁹Secs. 2031, 2031a-2035.

¹⁰Secs. 8835-8841.

¹¹Chap. 38, sec. 410.

¹²Sec. 10426.

¹³Chap. 289, sec. 14.

¹⁴Secs. 10961-63, 10975-83.

¹⁵Secs. 9920-9921.

¹⁶Chap. 37, Art. 1, secs. 2, 3.

¹⁷Sec. 5270.

¹⁸Sec. 3922.

¹⁹p. 148, sec. 71.

²⁰Chap. 64, sec. 23.

Maine,¹ Rhode Island,² Utah,³ and Wisconsin⁴ statutes provide that guardians may lease land under court directions, with a license or court order. Presumably a procedure similar to the one described may be requisite to the issuance of a court order in these and other states.

All the states which specify in their statutes how leasing should be done, require that it be done publicly, the time and place of the leasing being published and advertised in advance. If impracticable, however, the courts may give special permission for the transaction to be made privately subject to confirmation. The Arkansas⁵ statute provides:

"It is the duty of a guardian to rent land annually to the highest bidder, giving ten days notice by posting written or printed advertisements in five public places in the county, giving the time and place of renting. If impracticable, the court may allow private renting, such being subject to the approval of the court."

Georgia⁶ law prescribes that it be done under the same rules as a sheriff's sale, except that credit may be given. Louisiana,⁷ North Carolina,⁸ and New York⁹ also provide for public sales unless the court allows otherwise.

The guardian must receive security satisfactory to the court from the lessee and may be required to give additional bond to cover this income. The leases pledge the renters not to waste or destroy the property but to improve it. Tennessee¹⁰ leases provide that the tenant will (1) improve the land, (2) keep improvements in good repair, (3) not commit waste, and (4) not employ timber for use other than on the plantation. The guiding principle for the court and the guardian is that the land be used to produce the largest income for the ward and at the same time be improved and preserved.

Arizona,¹¹ Arkansas,¹² Kentucky,¹³ Mississippi,¹⁴ Ohio,¹⁵

¹Chap. 85, sec. 1.

²Sec. 5366.

³Sec. 7830.

⁴Chap. 296, secs. 06, 11, 21.

⁵Secs. 4187-90.

⁶Sec. 3067.

⁷Sec. 4676.

⁸Secs. 2171-72.

⁹Chap. 13, sec. 13.

¹⁰Sec. 8502.

¹¹Secs. 4157, 4158.

¹²Sec. 4190.

¹³Secs. 2031-35.

¹⁴Sec. 1879.

¹⁵Secs. 10975-83.

Oklahoma,¹ and Texas² have statutes relating to the leasing of mineral, oil and gas rights. In these and other states, it has been held that the ordinary power to lease does not extend to natural gas, coal, or other minerals which are to be carried away for commercial purposes.³ Leases on oil, gas, and, in some instances, timber, are usually classified as conveying the corpus of the estate and the giving of such privileges constitutes a sale of the land which requires permission of the court, even in those states where guardians may lease land without an order of the court. These leases may run for a longer time than land leases. Arizona and Ohio limit them to ten years, but the other five states permit long term leases. Ohio directs that if the guardian is unable to lease the mineral rights upon the terms ordered by the court, he may report to the court which will change the terms but not below the customary royalty of the vicinity. Mississippi and Oklahoma oil and mineral lands may be leased for royalty, part of the production, or rent. The commercial importance of oil and gas in recent times explains these additions to the statutes which are so prone to remain unchanged.

The guardian's power to lease lands makes it his duty to do so.⁴ Therefore, if he fails to lease, or to obtain a reasonable rental, or through negligence fails to collect the rent, he is liable to his ward for resulting losses.⁵

Mortgaging Real Estate.—The guardian has no power to mortgage his ward's real estate unless authorized by an order of the court in pursuance of a statute empowering the court to make such an order.⁶ Power to sell does not confer power to mortgage real estate,⁷ and a mortgage will be void where there is not

¹Sec. 1458.

²Sec. 3554.

³Daniels v. Charles, 172 Ky. 238, 189 S. W. 192 (1916), holds that "taking minerals from the land is not an ordinary use" and "leases cannot be made without an order from the court."

⁴Walker v. Thompson, 145 Ky. 597 (1911); Clark v. Burnside, 15 Ill. 62 (1853); Richardson v. Richardson, 49 Mo. 29 (1871).

⁵Hughes v. Green, 111 S. C. 453 (1918); Taylor v. Kellog, 103 Mo. App. 258 (1903).

⁶Woerner, American Law of Guardianship (1897), sec. 54.

⁷Stokes v. Payne, 58 Miss. 614 (1881); Davidson v. Vampler, 29 Montana 61, 74 P. 82 (1903).

strict compliance with the statute authorizing it.¹ Real estate may be mortgaged to debts, reduce, extend, or renew a lien or mortgage, erect, alter, or repair buildings or other structures or improve the property proposed to be mortgaged, support and educate the ward, secure any liability, when shown to be advantageous, if any exigency occurs, or when lands are imperiled by sale.

Some states² make no reference to the mortgage of real estate in their statutes. Many states³ describe the procedure as the same as that for the sale of real estate, or list mortgaging along with the selling and give no separate attention to it. Others⁴ describe the procedure which includes a petition setting forth reasons, facts, and description, notice to interested persons, and publication, hearing and the issuance of the court order. The court order usually states the maximum rate of interest, the period of the loan, the bond of the guardian, and in some cases a requirement that the buildings be insured.

Illinois⁵ statutes provide that:

¹Battell v. Torrey, 65 N. Y. Court of Appeals 294 (1875); Edwards v. Talliafero, 34 Michigan 13 (1876).

²Kentucky, Maryland, Nevada, Oklahoma, South Carolina, and others. Kentucky not only makes no mention of mortgages, but in the decision of Walker v. Thompson, 145 Ky. 597, 140 S. W. 1045 (1911), says the "mortgage of a ward's real estate, even with the authority of chancellor, is void."

³Iowa, sec. 12587; Massachusetts, chap. 201, secs. 28-30; Michigan, secs. 15848-50; Minnesota, sec. 3835; Nebraska, chap. 38, sec. 630; New York, chap. 13, sec. 13; Pennsylvania, Title 20, secs. 551-2; Texas, sec. 4195; Virginia, sec. 5335; Washington, secs. 9920-21; Wisconsin, chap. 316, sec. 01.

⁴Arizona, secs. 4151-53; California, sec. 1533; Connecticut, sec. 4949; Dist. of Columbia, sec. 1135; Idaho, secs. 7668-70; Illinois, chap. 64, secs. 24-27; Indiana, secs. 3405-07; Kansas, chap. 38, sec. 3; Maine, chap. 80, sec. 15; Mississippi, sec. 1881; Missouri, sec. 402; Louisiana, sec. 339 (Family meeting required as in other procedures); Montana, secs. 10426-27; New Hampshire, chap. 289, sec. 13; New Jersey, p.2632, sec. 15; North Carolina, sec. 2180; South Dakota, secs. 3547-49; Tennessee, sec. 8503; West Virginia, chap. 44, Art. 10, sec. 13, chap. 37, Art. 1, secs. 2 to 14; Wyoming, sec. 4195 (specifies that the mortgage not be more than two-thirds value).

⁵Chap. 64, sec. 3549.

"foreclosures on mortgages on wards' property shall only be made by petition to the court where guardianship letters were issued, the guardian and ward shall be made defendants and any sale made by virtue of any decree of foreclosure may, at any time before confirmation, be set aside by the court for inadequacy of price or other good cause and not be binding on the guardian and ward until confirmed by the court. No strict foreclosures shall be made on any mortgages but redemption shall be allowed as is now provided by law in cases of sales under executions upon common law judgments."

South Dakota¹ makes a similar provision. Such protection of wards' property may be exercised by courts in other states.

Sale of Real Estate.²—No phase of guardianship administration is so carefully guarded by legislation as the sale of real estate. Several factors contribute to this. Formerly, real

¹Sec. 3549.

²The provisions for the sale of real estate vary only slightly from state to state and therefore, a general summary of these laws suffices. The following is a summary of citations on this item: Alabama, secs. 8172, 8185-97; Arizona, secs. 4131-36; Arkansas, secs. 4194-4202; California, secs. 1531-39; Colorado, secs. 5291-5317; Connecticut, secs. 4823, 4945; Delaware, secs. 3934-35; Dist. of Columbia, pp. 147-148; Florida, secs. 5889, 5897-5900; Georgia, secs. 3060, 3064-66; Idaho, secs. 7869, 7884; Illinois, chap. 64, secs. 28-36; Indiana, secs. 3392-3409; Iowa, secs. 12587-96; Kansas, chap. 38, secs. 211-221; Louisiana, Laws of 1924, Act 149 and Laws of 1926, Act 173; Maine, chap. 80, sec. 15 and chap. 85, secs. 1-10, 15-30; Maryland, chap. 93, secs. 172-182; Massachusetts, chap. 202, secs. 5-26; Michigan, secs. 15800-15825, 15841-43; Minnesota, secs. 8834-56; Mississippi, sec. 1883; Missouri, secs. 405, 411, 413, 414; Montana, secs. 10428-43; Nebraska, chap. 38, secs. 601-19; Nevada, secs. 9516-26; New Hampshire, chap. 289, secs. 12, 15-19; New Jersey, pp. 2628-2838; New Mexico, chap. 62, secs. 133-35; New York, chap. 13, sec. 13; North Carolina, secs. 2180-82; North Dakota, secs. 8899-8911; Ohio, secs. 10945-55; Oklahoma, secs. 1466-82; Oregon, chap. 11, secs. 1401-13; Pennsylvania, Title 30, secs. 1421-23, 1161-65; Rhode Island, secs. 5340-65; South Carolina, secs. 5463-71; South Dakota, secs. 3533-44; Tennessee, secs. 8503-05; Texas, Arts. 3552-89; Utah, sec. 7830b; Vermont, secs. 3695-99; Virginia, secs. 5326-35; Washington, secs. 9914-17, 9920; West Virginia, chap. 44, Art. 10, sec. 13, chap. 37, Art. 1, secs. 2 to 7; Wisconsin, chap. 296, secs. 06-296.17; Wyoming, secs. 7033-7047.

estate represented the bulk of the non-perishable estate. Tradition, not so effective now as formerly, placed importance on keeping land in the family from generation to generation. Furthermore, the sale of real estate is a procedure which can be dealt with in greater detail than the care of the person or the expenditure of the income. The laws of most states, however, seem to have been written for agricultural rather than for town property. This is reasonable when it is remembered that the laws on Guardian and Ward, which were written when the United States was largely rural, have been changed little to meet changing conditions.

The guardian has no authority to sell real estate without an order of the court, and the order must come from a court of competent jurisdiction. There is some conflict of authority about the power of courts of equity to order sales. Some states hold that they have no inherent jurisdiction over this matter,¹ but the weight of authority is that they do have inherent power to order sales whenever beneficial to the infant.² Probate and other courts being courts of limited jurisdiction and deriving their powers solely from constitutional or statutory provisions, have no jurisdiction to decree sales in the absence of statutory directions.³ Where the statutes prescribe a mode of procedure, and they generally do,--they must be strictly followed.

There are other jurisdictional prerequisites. In some states the power to order sale is given to the court of the county where the land is situated. In others, it is given to the court which appointed the guardian, whose authority extends over all the property within the state. No court can authorize the sale of real estate situated outside the state, but a court can order the sale of land belonging to non-resident wards. What can be conveyed? Trust estates devised to the ward may be sold. Future interests as well as estates in possession, reversionary estates,⁴ and estates in remainder⁵ may be sold. The infant's homestead may be sold.⁶

¹Singleton v. Murray, 1 Head (Tenn.) 257 (1858); Faulkner v. Davis, 18 Gratt (Va.) 651 (1868).

²Shumard v. Phillips, 53 Ark. 37 (1890); Hale v. Hale, 146 Ill. 227 (1893); Long v. Long, 62 Md. 33 (1883).

³Shumard v. Phillips, 53 Ark. 37 (1890); Thaw v. Ritchie, 4 Machey (D.C.) 347 (1886).

⁴Foster v. Young, 35 Iowa 27 (1872).

⁵Wallace v. Jones, 93 Ga. 419 (1893).

⁶Merrill v. Harris, 65 Ark. 355 (1898).

Real estate may be sold for the purposes named in the statutes and for no others. Among purposes named are support and education¹ when the income and personal property are insufficient, payments of debts, the discharge of liens, repairs, and improvements on the estate. Sales are permitted when the real estate is suffering unavoidable waste and when better investments can be made. Some statutes merely say when necessary or expedient, when the court considers it wise and judicious, or when it appears to be for the ward's benefit. Another provision is sometimes found: when directions or permission is given in the will. Real estate may not be sold when it is in "contravention" or "violation" of the terms of the will.²

There are grounds which justify the court in denying the order sought. When the title is in doubt,³ when sufficient proceeds would not be realized to satisfy the purpose,⁴ when the effect would be to leave the ward in a destitute condition,⁵ and when it is not clearly for the benefit of the ward are among these grounds. Sale for the payment of debts will be refused if they can be paid in a reasonable time out of income.⁶

The first step a guardian makes toward selling real estate is filing a "petition" or making "application," which must be in strict compliance with the statute. The petition must show cause, set forth facts, conditions, and circumstances. Other facts which may or may not have to be set forth are the value and character of the real estate, the disposition of the personal estate, the amount and condition of the personal estate, the annual value of the real estate, the rent received, the proposed manner of reinvesting, each item of indebtedness, the age of the ward, where and with whom the ward resides, and all facts concerning the property. The application must be in writing and may be filed in the name of the guardian, naming the ward or wards, or in the name of the ward by the guardian. If required by statute, title papers or copies of them must be filed with the petition. The petition must also state the purpose and propriety of the sale. In Louisiana, the petition must come from a family meeting in

¹See pp.

²Iowa, sec. 12587; Kansas, chap. 38, sec. 211; Pennsylvania, Title 20, sec. 801.

³Moore's Estate, 9 Phila. (Pa.) 326 (1873).

⁴Lynn v. Lynn, 17 Ky. L. Rep. 1364 (1896).

⁵In re Hunter, 14 Grant Ch. (U.C.) 680 (1868).

⁶Linder v. Holmes, 2 Ind. 629 (1851).

which the presence of the under-tutor is essential.

Many jurisdictions hold that in the absence of statutory requirements, notice is not required.¹ Some jurisdictions have statutes which require notice and it is held that a sale without it is absolutely void.² The notice need not state the reason for the sale. The guardian's attorney is the proper person to give notice.³ Notice must give the time and place of hearing. The persons on whom notice must be served and the length of time allowed vary from state to state. Some statutes specify that notice be served on "those interested." Other specify the next of kin and those interested. If residents, these persons are supposed to be served personally with the notice. Kansas requires notice to the minor ten days before the time fixed for hearing, served personally, or, if a non-resident, notice by publication for two weeks in a newspaper which is to be mailed prepaid to him. General notices in newspapers or posted in public places are also frequently required. The time before hearing when notice must be served varies from ten days to several weeks, fourteen days being most frequently named. The publication of notice must be made two, three, or four successive weeks in the local newspaper. If notice must be posted in public places, the number of such places is usually five and one of them is the court house. The judge may postpone hearing whenever he feels further notice ought to be given.

Some states require the court to appoint two or more disinterested freeholders to appraise the estate. In a number of states, a guardian ad litem must be appointed to represent the minor. If the ward must be made a party to the proceeding, the guardian ad litem is considered necessary. Those who must be made parties to the proceeding vary from state to state.

At the hearing the guardian must establish to the satisfaction of the court or judge in vacation the existence of the grounds stated in the petition. The court must ascertain and determine whether the requisite facts exist. Witnesses are examined. Those who have objections have an opportunity to be heard. If all of the real estate is not to be sold, the court should select that part, the loss of which would be least injurious to the ward.⁴

¹Alabama, California, Georgia, Indiana, Kentucky, Massachusetts, Nebraska, Texas.

²Musgrave v. Conover, 85 Ill. 374 (1877); Rankin v. Miller, 43 Iowa 11 (1876); Rule v. Roach, 58 Miss. 552 (1880).

³Campbell v. Harmon, 43 Ill. 18 (1867)

⁴Leary v. Fletcher, 23 N. C. 259 (1840).

"If after full examination it appears necessary or expedient, an order is granted for the sale of a part or the whole of the real estate." The order directs the kind of sale and the terms of payment. The guardian is required to give bond to the state, or the ward, covering the value or twice the value of the estate to be sold. These orders are usually good for one year, and in some states may be renewed, but some states provide that the sale cannot be postponed beyond three months after the order is granted. If the sale cannot be made on the terms specified, a new hearing may be had and the order changed if the judge sees fit. If there is objection to the sale, the court costs are awarded to the party prevailing.

Real estate may be sold at public or private sale.¹ The usual procedure is public, but special conditions permit it to be private in some states. If public, the date of the sale must be announced in advance and advertised in the newspapers, by posters, or both. In a few states, if the sum involved is \$500.00, or in others \$1000.00, the sale may be conducted privately. The guardian is the proper person to conduct the sale and if he does not do it himself, he must supervise it closely. The limitations on price, etc. are greater at private sales than public one. The price obtained by private sale cannot be below the appraised value, but at a public sale, it may be three-fourths, or two-thirds, etc. The court may appoint commissioners to conduct the sale if any reason exists for excusing the guardian. The purchase of the ward's lands by the guardian or his agent is frowned upon and is not acceptable generally speaking.

The terms of the sale must be cash or part cash with credit terms, usually not beyond three years. With deferred payments, the guardian must demand notes, mortgage or deeds of trust on the property, and such additional security as the court deems fit.

After the sale is made, or in some states at the next term of court, the guardian must report the sale, the payment made, the credit arrangement, and the securities taken to secure the remainder or the purchase money. If the court approves, the sale is validated or confirmed and registered with the clerk of the

¹In Louisiana, property in which minors are interested can be sold at private sale only for the purpose of effecting a partition: Spears v. Spears, 173 La. 294 (1931).

"A private sale by a guardian becomes valid when confirmed by the court under General Acts of 1919, p. 193," Day v. Johnson, 158 Ark. 478 (1923)

court. If the sale is made in accordance with the directions and with the approval of the court, it is valid. A number of states allow a period of time during which the validity of the sale may be questioned. This period, ordinarily does not exceed three years. Broad powers are given to the court with respect to the confirmation of sales of real estate. Errors may be cured or the sale may be vacated and the property recovered. The confirmation of the court is essential to the release of a clear and valid title.

The court may authorize the guardian to invest the proceeds of the sale and any other money on hand in real estate, bonds, or other approved investments or placed at interest until needed for maintenance and education.

CHAPTER V
JURISDICTION AND PROCEDURE

Courts Having Jurisdiction

To exercise authority in appointing and supervising guardians, courts must have jurisdiction, which may be vested in them by common law or by statutory enactment. The jurisdiction is conferred by state authority since "A federal court has no authority to control the discretion of a state court in appointing a guardian or to designate who shall or who shall not be appointed a guardian."¹ At an early date, many states conferred by statute this jurisdiction on county and other courts of record which deal with probate matters.² In England, this jurisdiction is vested in chancery³ and such is the case in the United States in the absence of statutes conferring the jurisdiction on other tribunals.⁴ In many states where the jurisdiction is vested in another court, the chancery court is conceded to have a general supervisory power over guardians and wards, when it does not have original jurisdiction as well. In a view of the general principle that a court of equity never loses a jurisdiction which it has once assumed, except by reason of some statutory enactment, it is usually held that these statutes merely confer a concurrent jurisdiction unless legislative intent is clearly expressed.⁵ The chancery court will not interfere, however, where another court having jurisdiction first assumed jurisdiction and the remedy is adequate. Some special equity must be shown to justify the interposition of chancery. Jurisdiction in Mississippi continues to be vested solely in chancery courts. The powers vested in Juvenile Courts in recent years have not impaired the jurisdiction of probate and other

¹Detroit v. Blanchfield, 13 Fed. (2d) 13, 47 A. L. R. 314 (1882).

²Woerner, Preface, pp. v, vii.

³Until recently, this authority was vested solely in chancery.

⁴Mauro v. Ritchie, 16 Fed. Cases no. 9, 132; Williamson v. Berry, 8 How. U. S. 495 (1850).

⁵Lee v. Lee, 55 Ala. 590 (1876); Ames v. Ames, 148 Ill. 321 (1894); Willis v. Fox, 25 Wis. 646 (1870).

courts in the appointment of guardians because these powers apply only when the status of the child conforms to that described in the statute conferring jurisdiction.¹

Jurisdiction further depends upon the domicil or residence of the person needing a guardian and the location of his property.² The domicil of the ward's father at the time of his death is the ward's domicil. The domicil of the ward may be that of his mother. Residence is in some states held to give sufficient jurisdiction. The court of the county where the infant is found is sometimes authorized by statute to appoint a guardian.³ A representative expression of judicial opinion is that the "domicil of an infant is universally held to be the fittest place for the appointment of a guardian of his person and estate, although for the protection of either a guardian may be appointed in any state where the person or any property of an infant may be found."⁴ Domicil or residence is essential for an appointment of guardians of the person and property. The fact that a minor has property in one county and is domiciled in another county within the same state does not give the court of the former power to appoint a guardian,⁵ but if the infant is not domiciled in the state or county, the court having jurisdiction in the county where the property is situated may appoint a guardian of the property within that state.⁶ A federal decision has stated that

"the legislature of the state where the property is situated has power to pass laws for the appointment of guardians of the property of non-resident infants, situate in that state, and to prescribe the manner in which such guardians shall perform their duties as regards the care, management, investment and disposal of such property."⁷

The citizenship or nationality of the infant does not affect jurisdiction.⁸

¹Scott v. Brown, 160 Ark. 489 (1923).

²Wentz's Appeal, 76 Conn. 405 (1904); In re Johnson, 87 Iowa 130 (1893); Wells v. Andrews, 60 Miss. 373 (1882).

³Texas Revised Statutes (1925), Art. 2565.

⁴Lamar v. Micou, 112 U.S. 452, 5 S. Ct. 221, 28 U.S. (L. ed.), 751 (1884).

⁵Lacy v. Williams, 27 Missouri 280 (1858).

⁶Mauro v. Ritchie, 12 Fed. Cases no. 9, 132 (1827); Gaines' Succession, 42 La. Ann. 699, 7 So. 788 (1890).

⁷Hoyt v. Sprague, 103 U.S. 613, 26 U.S. (L. ed.), 585 (1880).

⁸Farrington v. Wilson, 29 Wis. 383 (1872).

Other facts are necessary to give court jurisdiction to appoint and supervise guardians. One is the infancy of the ward. Another is the lack of a guardian. If there is already a guardian of the person duly appointed and not resigned or removed by court order, another cannot be appointed and if appointed, the appointment is void. The death or disability of the father and mother must be shown. If an infant lives in another state, it must be shown that he has property situated in the territorial jurisdiction of the court. If the statutes permit minors over fourteen to choose their guardians, an appointment of a guardian for one over fourteen made without first giving notice and opportunity to the minor to make choice of a guardian is void for want of jurisdiction.¹

The jurisdiction of courts over guardians and wards is somewhat peculiar in that it is continuous over the entire duration of the guardianship. It does not arise alone for the appointment of guardians, for the hearing of accounts, for the sale of real estate, or for any other particular cause for which the guardian, ward, or next friend might bring it into the court for particular attention; and it ceases upon the termination of the guardianship. The jurisdiction of the court usually extends beyond the particular county to superintendence of the estate wherever located within the state. Most frequently the court appointing the guardian has supervision over the entire guardianship, — person and property; in a few states, however, superintendence of the sale of real estate is transferred to another court in the same county or district.

Matters pertaining to guardianship are usually cared for by the court during its regular session or by the judge in vacation. If the latter procedure is permitted, some states require the approbation of the court when it next convenes. Other persons than the court or the judge may exercise superintendence: in some states the clerk of the court may appoint and have general control over the guardians. In North Carolina,² the clerk has "full power to take cognizance of all matters concerning orphans and their estates and to appoint guardians for infants," but judges must approve sales and mortgages of real estate or any transfer of title of the ward's property. The clerks and registers of other states take and examine annual accounts. Administrative officers of the court are empowered to do much of the actual superintendence of guardians and wards. How are these administrative officers

¹Sherman v. Ballou, 8 Cow. (N. Y.), 304 (1828).

²Secs. 2150, 2180.

chosen? Is their selection made with the view to meeting the needs of those they serve: It is not! On the whole, no special qualifications are demanded. The judge's approval of annual accounts is based on the examination made by the clerk. Any delegation of guardianship work to inferior officers of the court is dangerous unless care is taken in their selection.

In every state the statutes exhibit more caution in the administration of the estate than in the appointment of the guardian and superintendence of the person of the ward. These latter functions must clearly be discretionary with the court and cannot be prescribed in detail by legislation. The great weakness here is found in the absence of personnel standards which could be stipulated in the law.

In eighteen states jurisdiction over guardians and wards is vested in the probate courts. These states are Alabama,¹ Arkansas,² Connecticut,³ the District of Columbia,⁴ Idaho,⁵ Kansas,⁶ Louisiana,⁷ Maine,⁸ Massachusetts,⁹ Michigan,¹⁰ Minnesota,¹¹ Missouri,¹² New Hampshire,¹³ New Mexico,¹⁴ Ohio,¹⁵ Rhode Island,¹⁶ South Carolina,¹⁷ and Vermont.¹⁸ Four of these states make additional jurisdictional provisions. In Alabama, upon a petition for better administration, jurisdiction may be moved to the circuit court in equity.¹⁹ The judge of probate in

¹Sec. 8135.

²Sec. 4145.

³Sec. 4766.

⁴Sec. 1125.

⁵Sec. 7842.

⁶Chap. 38, sec. 202.

⁷Louisiana Civil Code of Practice. Dart (1932), Art. 924.

⁸Chap. 80, sec. 1.

⁹Chap. 201, sec. 1.

¹⁰Sec. 15763.

¹¹Sec. 8916.

¹²Sec. 375.

¹³Chap. 290, sec. 1.

¹⁴Chap. 62, sec. 101.

¹⁵Sec. 10915.

¹⁶Sec. 5654.

¹⁷Sec. 3633.

¹⁸Sec. 5543.

¹⁹Sec. 8102.

Connecticut may call in any judge of the superior court or of common pleas or any other judge of probate.¹ Jurisdiction is concurrent with any other court of equity in the District of Columbia.² The laws of New Mexico give the right to appeal to the district court from any probate court decision, and give the district court general superintendence as well as original jurisdiction when it appears by petition that either the guardian or the judge is not complying with the law,³ and give the district court concurrent jurisdiction when a person who has had charge of a minor for seven years with the minor's parents or either of them living, desires to be appointed guardian of such a minor under ten years of age. Thereupon either court may investigate and if the transfer from the natural or the foster parent appears beneficial to the minor, it appoints the petitioner.⁴ In Maine,⁵ jurisdiction is transferred to the adjoining county if the judge is disqualified in any instance such as when he is the parent, testamentary guardian, is interested in his own right, or is within the sixth degree of kin.

The county court or judge in vacation has jurisdiction in the next largest number of states, which are Colorado,⁶ Florida,⁷ Illinois⁸ (except when a probate court exists in the county),⁹ Kentucky,¹⁰ Nebraska,¹¹ North Dakota,¹² New York (in counties without surrogate courts),¹³ Oklahoma,¹⁴ Oregon,¹⁵ South Dakota,¹⁶ Tennessee,¹⁷ Texas,¹⁸ West Virginia,¹⁹ and Wisconsin.²⁰ There are likewise variations from the usual jurisdiction in these states. For selling and mortgaging real estate in Colorado²¹ and Nebraska,²² the district court has concurrent jurisdiction with the county court, and appellate as well as original jurisdiction

¹Sec. 4767

²Sec. 1123

³Chap. 62, sec. 126.

⁴Chap. 62, sec. 130.

⁵Chap. 80, sec. 1.

⁶Sec. 5540.

⁷Secs. 5885, 5888

⁸Chap. 64, sec. 2.

⁹Illinois Constitution,
Art. VI, chap. 6, sec. 18.

¹⁰Sec. 2015.

¹¹Chap. 27, sec. 503.

¹²Sec. 8524.

¹³Constitution, Art. VI,
secs. 12-13.

¹⁴Sec. 6581.

¹⁵Chap. 11, sec. 1302.

¹⁶Sec. 2310.

¹⁷Sec. 8476.

¹⁸Sec. 4102.

¹⁹Chap. 44, Art. 10, sec. 2.

²⁰Chap. 319, sec. 01.

²¹Sec. 5312.

²²Chap. 27, sec. 503.

with the county court in Texas.¹ The circuit court has jurisdiction in Florida,² when the county judge is himself a guardian, in Illinois,³ for trials or petitions of non-resident guardians. In West Virginia,⁴ for granting extra disbursements and in Wisconsin,⁵ concurrent jurisdiction for disposing of land. County or surrogate courts now handle guardianship matters in New York;⁶ the same power was formerly held by the chancellor.⁷

The chancery court in Mississippi⁸ continues to hold sole jurisdiction. In four of the states having county court jurisdiction, the chancery court retains general or specific powers. In Kentucky,⁹ the law provides that the several courts of chancery shall have power to hear and determine all matters pertaining to guardianship. In giving jurisdiction to the county courts, the Tennessee¹⁰ statutes say "but power of the chancery court over such estates are not abridged." A Tennessee decision¹¹ refers to the division of power and states that:

"the powers of the county courts are altogether statutory and there is no general statute authorizing the county court to receive from a guardian the estate of his ward, nor to undertake the distribution of it. The determination of the propriety of encroaching on the corpus of a minor's estate is regarded as one of the most delicate and responsible duties which devolve upon a court of chancery, and in the absence of a special statute, no other court in this state has any jurisdiction of the subject."

This would indicate that the powers of the chancery court of Tennessee are not only concurrent with the county court but greater than those of the county court. Chancery takes over the juris-

¹Sec. 4102.

²Sec. 5890.

³Chap. 64, sec. 47.

⁴Chap. 44, Art. 10, sec. 8.

⁵Chap. 296, sec. 01.

⁶Constitution, Art. VI, secs. 12, 13.

⁷In re Thorne's Estate, 213 N. Y. S. 419 (1925)

⁸See: Courts having Jurisdiction p.

⁹Sec. 2139.

¹⁰Sec. 8476.

¹¹Re Mallie Woods, 158 Tenn. 383, 13 S. W. (2d) 800 (1929), citing Mitchell v. Webb, 2 Lea (Tenn.) 150 (1879).

diction of the estate in Florida¹ on the refusal or neglect of the county judge. Chancery courts have the jurisdiction of the sale of real estate in West Virginia.² Whether the supervision of chancery courts is superior to that of county or probate courts in any particular case is difficult to know. Some of these states seem to guard the power of chancery courts jealously and though shared, they are not restricted. If the jurisdiction of chancery courts is considered superior in quality in West Virginia, it would seem advisable to place matters related to the person of the ward with these courts also. Of greatest importance is the placing of jurisdiction with the court most equipped to handle these important and delicate relationships. Tennessee and Mississippi reveal something of English tradition perhaps.

The district court has jurisdiction in Iowa,³ Montana,⁴ Nevada,⁵ Utah,⁶ and Wyoming.⁷ In case of conflict or trial, appellate jurisdiction would probably belong to a higher court, but these six states provide district court jurisdiction alone for Guardian and Ward. As indicated, the district court has concurrent jurisdiction with the county court, and appellate as well as original jurisdiction with the county court in Texas. Whether placing jurisdiction in more than one court improves matters for wards or not is questionable. At present no court is equipped to give the variety of services which this jurisdiction requires in order to carry out the super-parental responsibility of the state.

Arizona,⁹ California,¹⁰ North Carolina,¹¹ and Washington,¹² assign jurisdiction to the superior court; North Carolina gives it exclusively to the clerk of the court. In addition, California provides that appeals in guardianship proceedings be made to the

¹Thomas v. Williams, 9 Fla. 289 (1860).

²Chap. 44, Art. 10, sec. 13.

³Sec. 11819.

⁴Sec. 5877.

⁵Sec. 9496.

⁶Sec. 7809.

⁷Sec. 7011.

⁸Art. 4103.

⁹Sec. 4107.

¹⁰Probate Code of California (1931), sec. 166.

¹¹Sec. 2150.

¹²Sec. 9897.

supreme court.¹

The Orphan's Court in Delaware,² Maryland,³ New Jersey,⁴ and Pennsylvania⁵ have jurisdiction over Guardians and Wards. Exceptions to guardian's accounts are heard in Delaware by the superior court.⁶ In these states orphan's courts were established very early in colonial times and have been retained as a characteristic division of judicial organization.

In Indiana,⁷ the circuit court has jurisdiction. In Virginia,⁸ the assignment is similar but much more complicated; the circuit court, judge, or clerk has jurisdiction except in Richmond, where the chancery court, its judge or clerk, and in other cities, where the corporate court, its judge or clerk, supplant the jurisdiction of the circuit court.

The jurisdiction over the private legal relationship of Guardian and Ward is placed exclusively in the judiciary. With one exception, the statutes of the several states provide for no supplementary services other than that offered in connection with the beneficiaries of the United States Veterans' Administration. This exception is found in the laws of Illinois.⁹ The Bureau of Public Welfare Act of 1925 of Illinois "in aid of the power and duties of such counties (500,000 or more), and the powers, functions, and authority of courts of record in such counties relative to the social service functions of the said counties and courts" describes the social services included within the Act. It provides that they "shall be construed to embrace and include all powers, functions and duties of social service investigators and other social service officers and employees authorized and conferred or imposed by law relative and pertaining to" eleven groups which are listed in the Act. Among those listed are "minors, as provided in an Act in relation to Guardians and Wards, approved April 1872, as amended. This is the Illinois law on Guardian and Ward. The Court Service Division of the Cook County Bureau of Public Welfare

¹Probate Code of California (1931), sec. 963.

²Sec. 3089.

³Chap. 93, sec. 1.

⁴Chap. 36, p. 3825.

⁵Title 20, sec. 2241.

⁶Sec. 3095.

⁷Sec. 3380.

⁸Sec. 5316.

⁹Chap. 23.

has developed and offers services to the clients of the Bureau and of other social agencies in connection with the courts, among them the Probate Court of Cook County. This does make possible social and legal services to those known to the Bureau of Public Welfare, directly or by referral. These already have social case work treatment. Though valuable and needed for them, it does not reach the vast number of Guardians and Wards who are not known to social agencies, and who may be equally in need of intelligent and social supervision. In the future, state departments of public welfare may properly make similar provisions in connection with the courts in the various local courts.

Appointment Procedure

The appointment of a guardian waits on a petition or application for guardianship, since there is no principle that every child must have a guardian. The period between the time when a child is first without a natural guardian and when a legal guardian is provided is not ordinarily referred to in the statutes. Unless a will is probated or a situation is conspicuously perilous to the child's personal welfare, there is little chance for notice to come to the court that a minor is without a natural or legal guardian. A very few states¹ make the following provision: "It is the duty of the judge of any court, any justice of peace, sheriff, or constable, if they know of any minor within the county without legal or natural guardianship to communicate the fact, with the name and residence of the minor to the court, which shall thereupon proceed to appoint." The civil law² in Louisiana obligates the relatives to apply for the appointment of a guardian within ten days after need for one arises.³ Otherwise, the statutes are silent until application for appointment is made, whenever that may be. It is impossible to estimate the number of minors in the United States who are without natural or legally appointed guardians. The very fact that the number is unknown is evidence that the state fails to exercise its parental authority and responsibility. Statistics are not available for the number of legally appointed guardians. The extent to which the institution of guardianship is utilized is unknown. The statutes on

¹Arkansas, Missouri, Oklahoma, Texas.

²Sec. 208.

³Roman law from which civil law is derived had the idea of a guardian for every child. This may account for the rule in Louisiana.

Guardian and Ward indicate a preference that guardians not be appointed unless necessary and convenient, and do not encourage courts to appoint guardians simply because minors are without them. For purposes of litigation, of course, the court can always appoint a guardian ad litem. This is not sufficient protection. For a temporary cause, such guardians serve the purpose of attorneys or means for appointing attorneys which infants are legally incompetent to appoint. Such temporary representatives of the infant are not able to consider the problems of the ward or his estate as a whole or serve the infant beyond the particular issue in litigation. The very term "guardian" is a misnomer. Can a guardian ad litem be compared with a parent for whom a guardian is the legal substitute? Obviously, a guardian ad litem only offers an answer to the legal incapacity of an infant who becomes involved in a civil action. A child and his estate needs constant care, supervision and control.

Many orphans never have legal guardians, and many who have had guardians appointed by the courts were without them varying lengths of time before the appointments were made. Orphaned children without property are generally without guardians unless they have come to the attention of the juvenile courts because of dependency, neglect, or delinquency, or are in the custody of some charitable institution or agency with whom their guardianship is placed. Courts having jurisdiction over Guardians and Wards are usually not informed of the lack of guardianship until a petition is made for appointment. The months or years which have elapsed during the interim can only be conjectured. Some indications of the slowness with which applications are made is found in the laws relating to testamentary guardians. In many states, testamentary guardians are not qualified to act until they have been appointed by the court. Yet, only a few states fix a length of time within which they must qualify. When the time is named, it varies from thirty days to six months. Six months is a considerable time for a minor to be without a legal guardian, particularly when these months follow immediately upon the loss of a parent. During these months, the home may be completely broken up and new adjustments must be made. Damage to the person and property can easily occur in the unsettled circumstances shortly after the death of parents. If a child ever needs the state's parental care and supervision, this is the time. The informal care given orphaned minors by relatives and friends may be the best that could be had and the kindness and generosity of kinsfolk and neighbors can not be doubted. Even when no estate has been left, care and attention as well as support and education have often been given children by persons with no legal responsibility

or authority. It is not reasonable to expect that this will always be the case. The state cannot leave the care, support, and protection of its wards to chance. Provision must be made for promptly filling the office of guardian whenever and however it may be vacated.

Temporary arrangements.--Some delay after the minor's need disregarding entirely the period of time which may pass officially unnoticed after the need of a guardian arises and before a petition for a guardian is made, there is a necessary lapse of time between application for guardianship and the issue of letters of appointment has been presented to the court is unavoidable. What provisions are there for temporary guardianship pending appointment, or during delays, or in case of appeal? When any time limit is set on testamentary guardians within which they must qualify or forfeit their trust, it is at least thirty days, usually three months or longer. Before the court can appoint a guardian for a minor over fourteen, at least ten days notice must be given the minor to choose his own guardian. If a minor is with his parents, they must have notice and opportunity for nearing,--a delay covering several weeks. If a prospective guardian is unable to arrange bond on the day set for the appointment, a further delay is necessary. To what extent do the states meet their parental responsibility after the court is aware of the need for a guardian?

Only a few states provide in their statutes for temporary guardianship. Colorado,¹ Georgia,² Michigan,³ Minnesota,⁴ Mississippi,⁵ South Carolina,⁶ and Wisconsin⁷ provide that, pending appointment or in delay in appointment, if the judge deem it fit and proper or if it appears very necessary, he may appoint a temporary guardian who gives bond and acts as any other guardian until a permanent one is qualified. Virginia⁸ and West Virginia⁹ permit the judge to appoint a curator until a guardian has given bond or while there is no guardian. The curator gives bond and

¹Sec. 5227.

²Sec. 3046.

³Sec. 15774.

⁴Secs. 8951, 8952.

⁵Sec. 1870.

⁶South Carolina, Laws of 1930, No. 711.

⁷Chap. 319, sec. 42.

⁸Sec. 5319.

⁹Chap. 44, Art. 10, sec. 6.

is responsible in the same way as a guardian.

When the child's person is endangered in its present custody, provisions, if any, for removing the child are usually found in the chapters of the law entitled "Juvenile Court," "Charities and Corrections," etc. These provisions relate particularly to the dependent, neglected, and delinquent groups. The guardianship of these groups needs separate treatment and will not be included here. A few exceptions found in the statutes on Guardian and Ward will be touched upon. In California,¹ it if appears to the judge or court from the petition that the welfare of the child is imperiled, temporary custody may be ordered until after the hearing. In Connecticut,² when application is made for the removal of parents or guardians of the person, the court, if it deems necessary, may order the custody changed pending determination. Upon petition of the mayor, selectmen, overseer of the poor, or any other person, the court in Massachusetts³ may appoint a temporary guardian with or without notice, and may in like manner remove him and terminate the trust upon a permanent appointment. The Arkansas Humane Society⁴ or any other such society incorporated under the state laws may be appointed temporary guardian upon the society's application, if it appears that the child is under fourteen and without a guardian, or is endangered in his present custody. When such a society is appointed guardian, it has the powers and duties of guardian of the person until the child reaches fourteen. At this age the child is permitted to choose a guardian. Such a society may upon affidavit have the court direct the sheriff to take the child away from the present custody and deliver him into the society's custody and a child so obtained can remain with the society for thirty days but no longer. During this time application for a duly appointed guardian must be made or the child is returned to the former custody. In Mississippi,⁵ when no other guardian can be found or can qualify, the clerk of chancery may be appointed. In North Carolina,⁶ if no application is made in six months, and in Wisconsin⁷ after thirty days, the public guardian may be appointed. Louisiana⁸

¹Code of Civil Procedure of California (1931), sec. 1442.

²Sec. 4795.

³Chap. 201, sec. 14.

⁴Secs. 4148-4152.

⁵Sec. 1871.

⁶Sec. 2194.

⁷Chap. 319, sec. 42.

⁸Sec. 208.

binds relatives in the parish to apply to the judge for the appointment of a guardian within ten days after the need for one arises and the relatives are responsible meanwhile for damages. This is the only state providing by statute for continuous liability for guardianship. A California decision¹ states that:

"the order for temporary guardianship is designed simply to enable the superior court, on ex parte showing of necessity, to provide for temporary custody of a child and its production in court until hearing can be had on petition for guardianship and the court informed of the immediate necessities with regard to the welfare of the child."

Administrators and executors may be appointed to fill this temporary need or courts may fill it without statutory directions. For example, in New York² the "surrogate court may appoint a temporary guardian pending investigation as to the character of the person who is applying to be appointed permanent guardian." Legislative provisions, however, are notably inadequate to guarantee temporary guardianship until responsibility for the child's welfare and estate is permanently placed. The existing custody of the person may be highly unsatisfactory if not dangerous, and matters pertaining to the estate may be urgent during the time before appointment is made. The need for temporary arrangements is obvious. If a person who anticipates being appointed guardian assumes authority, he does so at his own risk. The need for temporary provisions could be reduced greatly by prompt action by the court and the avoidance of unnecessary delays. A permanent guardian, however, should not be appointed until the court has had ample time to investigate the situation thoroughly and be prepared to make an intelligent and satisfactory disposition of the guardianship. In order to provide temporary care and at the same time determine the proper appointment, the court must be assisted by trained personnel to provide for the immediate situation as well as to advise in the disposition of the case. Time may elapse between the first need for a guardian and the acquaintance of the court with that fact, and every endeavor must be made to reduce the length of this time. In this interim the court obviously cannot be held directly responsible. After the court is aware of the of the absence of necessary guardianship, the state can not justify an indifference to its responsibility.

Petition, Notice, and Hearing.—The courts having jurisdiction proceed upon application for guardianship made by motion

¹In re Pinnell's Guardianship, 184 Cal.270, 193 Pac. 574 (1920).

²In re DeSaulles, 167 N. Y. S. 445 (1917).

or petition which may be filed in the court by the infant in person, if fourteen years of age, by "next friend," or by any friend or relative in his behalf. The petition should be in writing setting forth necessary facts and should name the person proposed for guardian and state his consent to be guardian and further state whether the application is for a guardian of the person or the property or both. Usually the petition must be verified. The facts which must appear are: the person must need a guardian, the court must have jurisdiction, and the person to be appointed must be qualified to act.

A minor having property is in need of a guardian of the estate. A need for a guardian of the person may arise because of the death or declared incompetence of both parents or the surviving one, or by reason of the death, resignation, or removal of a previously appointed guardian. The court having jurisdiction¹ can appoint a guardian provided the minor is domiciled or resides within the territory of the court's jurisdiction or, if a non-resident, has property situated therein. An appointment made when the infant has neither residence nor property within the county is void. If a guardian has been appointed and has not resigned, or his letters have not been properly revoked, there can be no valid appointment of another. The appointment of some one ineligible to act does not, however, preclude a subsequent valid appointment. If a minor's property is rightfully in the hands of a testamentary trustee, there is no necessity for a guardian of the estate and an appointment can be made for the person only. Certain persons are disqualified by statute to act as guardian. The qualifications of others are determined at the time of appointment.

In addition to jurisdictional prerequisites, the statutes usually direct that notice be given to certain persons, served either personally or by publication or both. It seems reasonable to presume that persons given priority or preference by the statute should be made parties to the proceeding and would therefor require notice. When minors over fourteen years of age are given power to choose their own guardians, an appointment without notice to them is void, whether or not the statutes specify that notice be given to them. A number of states fail to provide for notice in their statutes, and in these states and others, the right to nominate or right to preference presumably determine those to whom notice must be given. It has been held, however, that the appointment of a guardian for a minor under fourteen is valid,

¹See: "Courts having Jurisdiction," pp. 101-110.

though no notice be given to anyone, either by service or publication, where the statute does not require such notice.¹

The various states make the following statutory provisions for notice. Alabama, Delaware, the District of Columbia, Florida, Indiana, Iowa, Kansas, Kentucky, Massachusetts, Mississippi, Maine, Nebraska, New Jersey, New York, Oregon, Pennsylvania, South Carolina, Virginia, and West Virginia make no provisions for statutory notice in connection with the appointment of guardians. Colorado² and Tennessee³ require notice, but do not specify to whom it must be given or fix a time. Arkansas⁴ requires notice to the minor; Wisconsin,⁵ a ten day notice to the minor; New Hampshire⁶ requires notice to parents. Connecticut⁷ provides that notice be given to parents or guardian of the person and to the minor; Maryland⁸ provides for notice to the father if living and to the mother if the father be deceased. Minors over fourteen must be personally cited in Texas⁹ and a notice must be posted in three public places for ten days before the term of court. The petitioner shall not be appointed in Rhode Island¹⁰ unless notice of at least fourteen days has been served on the intended ward, if twelve years of age, and if under twelve, to the next of kin or interested friend. The parent in Vermont¹¹ must have six days notice if in the state and must be notified by mail and advertisement if out of the state. In Georgia,¹² thirty days notice must be given by publication in the local gazette. Those entitled to join in the family meeting in Louisiana¹³ must have either done so or declined before the judge can make the appointment. The one having custody in Nevada¹⁴

¹See pp. for preference among guardians to be appointed by the court. Gibson, Appellant, 154 Mass. 378 (1891)

²Sec. 5230.

³Secs. 8480-81.

⁴Sec. 5008.

⁵Chap. 319, sec. 02.

⁶Chap. 290, sec. 6.

⁷Secs. 4794, 4797-98.

⁸Chap. 93, sec. 151.

⁹Secs. 4114-16.

¹⁰Sec. 5669.

¹¹Secs. 2774-2776.

¹²Sec. 3039.

¹³Sec. 320.

¹⁴Sec. 9496.

must have from ten to twenty days notice and notice must be posted in three public places. Ten days notice is required in Washington¹ to those "entitled" to notice. Arizona,² Idaho,³ Montana,⁴ Oklahoma,⁵ North Dakota,⁶ South Dakota,⁷ Utah,⁸ and Wyoming⁹ require notice, to the one having custody and to relatives in the county, as the court or judge deems reasonable or proper. California¹⁰ makes a similar provision but extends it to relatives living within the state and to the minor, if over fourteen. North Carolina¹¹ names relatives and other proper persons. Illinois¹² provides that unless the proper persons are before it, the court shall assign a day for hearing and give notice to relatives in the county. Michigan¹³ requires a fourteen day notice by mail to those not in the county. Missouri¹⁴ provides that when a curator of the estate is needed, ten days notice must be given to parents and to the minor if over fourteen. Missouri makes no provisions for notice before the appointment of a guardian of the person. While Massachusetts¹⁵ does not make statutory provision for notice, this state does provide that if a guardian has already been appointed and a person with a testamentary appointment petitions to be appointed, notice must be given to the existing guardian.

Although in the absence of any statutory requirement, notice is not required to be served on any person, failure to give notice is fatal to the extent it was required by statute.¹⁶

¹Sec. 9899.

²Sec. 4107.

³Sec. 7842.

⁴Sec. 10401.

⁵Sec. 1431.

⁶Sec. 8874.

⁷Sec. 3492.

⁸Sec. 7809.

⁹Sec. 7011.

¹⁰Probate Code of California (1931), sec. 1441.

¹¹Sec. 2156.

¹²Chap. 64, sec. 10.

¹³Sec. 15764.

¹⁴Secs. 376, 383.

¹⁵Chap. 201, sec. 3.

¹⁶In re Gibson, 154 Mass. 378, 28 N. E. 296 (1891);

Kelly v. Edwards, 38 Mich. 210 (1878); Hanley v. Russell, 63 N. H. 614 (1883)

In selecting a guardian of a child, the court of chancery is not restricted to any particular form of proceeding. It may refer the matter to a Master, or the facts may be inquired into in open court, or the court may determine the selection from its knowledge alone.¹ Chancery court appointment, however, is rare at the present time. Statutory tribunals--probate, county, orphans, etc.--which have been created with special jurisdiction over the appointment of guardians for minors are regulated by statutory provisions which must be complied with. This statutory proceeding is not a civil action; it is what is known as a special proceeding. The power to appoint guardians ought to be exercised in open court at regular court term, but the judge or clerk may be authorized by statute to make a provisional appointment in vacation² to be acted upon at the next term of court.³

If all the persons who must have notice appear before the court, judge, or clerk with the petition, the judge may proceed to appoint. If notice is given, a day is set for the hearing of the petition. At the time of hearing, the court is charged with making the appointment in accordance with the best interests of the minor. The court, however, is not obliged, nor is it prepared, to go beyond the surface of the evidence presented to it. The court is not equipped to make any independent investigation into the merits of the appointment. If all the necessary persons are before the court and agree to the petition, it is not likely that other possibilities, which might better serve the welfare of the minor, will be explored. A few questions from the bench, a few reassuring answers from the attorney or interested persons, and the appointment is made. If, however, the petition is opposed or contested, or a counter petition is presented, the court must go more deeply into the question of which of the alternatives will best meet the needs of the minor, must take evidence from both sides, and must determine the appointment on the paramount issue, which is the welfare of the child. When the matter is determined and bond is taken, letters of guardianship are issued.

When letters are issued and the guardian has given bond and duly qualified, he enters upon the discharge of his duties with the approval of the court and his acts cannot be collaterally

¹Cowls v. Cowls, 8 Ill. 435, 44 Am. Dec. 708 (1846).

²See: pp. Courts having Jurisdiction.

³But, it has been held in Arkansas (Shumard v. Phillips, 53 Ark. 370 [1890]) that letters granted by the clerk in vacation cannot be collaterally attacked, although so subsequent express confirmation is shown.

attacked.¹ The letters or the court record are evidence of his authority. An appointment made by a court in due exercise of its jurisdiction cannot be impeached or set aside, or questioned by any other court except in equity for fraud, or by a direct appellate proceeding, but it may be corrected or annulled by the court having made it, if made under circumstances authorizing a court to revise or correct its own judgments.² It has been held that the matter of care and custody of a child is never settled so finally that a court, may not, upon proper showing, order a change of guardians.³ After appointment, the guardian continues to be under the supervision of the court appointing him which may at any time issue orders, compel obedience, or remove the guardian for cause. "Cause" can be so liberally interpreted that, if removal of a guardian would serve the best interests of the minor, there is sufficient cause. The appointment itself is subject to appeal which may be taken to any court or equity or to the appeal court named in the statutes for that purpose. When the appointment is appealed, the appellate court is not limited to reversing or affirming the decision of the probate or other court, but has authority to enter an order appointing a guardian.⁴

Courts having jurisdiction to appoint guardians may appoint guardians of the estates of non-resident minors. Courts are also authorized by statute to recognize duly appointed guardians, from other states who present their certified credentials, and issue ancillary letters of guardianship to them or empower them to act with reference to the estate of non-resident minors. Like resident guardians, foreign guardians must give bond covering the proceeds of real estate sales or whatever actions they may take relative to the property. Provisions for foreign guardians correspond to those of resident guardians and may be found in the statutory chapters on Guardian and Ward.

Inventory.—An inventory is an itemized statement of the ward's property and its valuation. Items which may have been omitted in the first inventory can be added at any later accounting. The necessity of an inventory is self-evident. It is indispensable both in the administration of the estate and in the care of the person of the ward. For the guardian of the estate, the inventory provides an initial and fundamental record of what

¹Woerner, American Law of Guardianship, p. 111.

²Ibid.

³In re Reimenschneider, 164 N. W. 736, Iowa (1917).

⁴Mahan v. Trantvetter, 305 Ill. 395, 137 N. W. 230 (1922).

belongs to the child. As time passes, the claims of the child to his property become more and more difficult of proof. The inventory supplies an official record which has been verified and accepted by the court. The proper appraisal of the items in the inventory is important. The correctness of future financial statements and the success or failure of the guardian in managing the estate can only be judged by comparison with the original valuation and condition of the estate. Periodical accountings and the final settlement are based on the inventory. As is evident, the inventory is essential to any control over the administration of the ward's property.

The guardian of the person finds in the inventory a summary of the available resources which he can draw upon in setting up an intelligent and practical plan for the future care and education of his ward. These resources should be used in the fulfillment of a wise social plan for meeting the needs of the child. The consumption of the estate should be calculated to suit the ward's capabilities and his ultimate social position. What cannot be wisely used ought to be saved for the future. Supervision of small estates is an urgent social necessity. A large estate can provide greater opportunities than a small one and can suffer waste and mismanagement with less prospect of serious injury to the child. The state is obligated to know what belongs to the child and see that it is protected, whatever the size of the estate. Although the value of the estate may change, any permanent plan for the ward must be based on an inventory.

The statutes on Guardian and Ward in most of the states devote an entire section to the requirement that an inventory of the estate be returned to the court appointing the guardian. An inventory is also frequently one of the conditions of the bond. When provided for only as a condition of the bond, it has been held to confer jurisdiction on the court to require the guardian to comply with the condition.¹ An inventory seems a necessary prerequisite to the bond, if the bond and penalty are to be accurate and sufficient. Yet, with one exception, it appears that before letters of guardianship are issued a bond must "be entered into" and only thereupon follows a requirement that within so many days or months a true and full inventory be returned. Louisiana alone requires that the inventory be returned first and the bond arranged accordingly. This delay, usually three months, seems unnecessary. If the guardian is appointed after the estate has come to the child, which would be after the estate is settled,

¹Peel v. McCarthy, 38 Miss. 451 (1888).

an inventory has already been made for the settlement of the estate as well as for the payment of inheritance taxes. A year is allowed for the settlement of an estate. If appointed after the settlement, inventory should be filed at the time of appointment and bond be fixed accordingly, an inventory having already been made. If the guardian is appointed promptly and the estate has not been settled, his bond need cover only the allowance for support and education which is granted the child pending settlement of the estate. At present, presumably, the statute permitting the court to require additional bond at any time is supposed to cover any discrepancy between the value of the estate disclosed in the inventory and the amount of the original bond which is evidently based on a rough estimate of the value of the estate.

In every case the inventory should include everything which belongs to the ward. The statute requires the inventory to be "true and perfect" and includes, in more or less detail, personal property, real estate, goods and chattels, rights and credits, annual income and profits, etc. Half the states prescribe the mode of appraisement: either giving detailed provisions or requiring it in the manner of the estates of deceased persons. In the other states, some form of appraisement may be used for arriving at an impartial estimate and complete inventory of wards' estates, but it is not provided for in the statutes on Guardian and Ward. Sometimes, if the estate is entirely in moneys and bonds, the amount on the face of them may be reported and a formal appraisement omitted.

In all states, the inventory is filed and recorded in the office of the clerk of the court, or in a special book for that purpose, or in the recorder's office or some other place with the bond, letters of appointment, and further records of the guardianship. The inventory constitutes a basis for future accountings and final settlement. It is prima facie evidence of the property coming into the guardian's hands, but it does not preclude his liability for other property which can be shown to exist. Inventories are to be made under oath of the guardian and attested generally by two or more disinterested persons appointed by the court to aid in making the inventory.¹ The real value of the inventory depends upon its fullness and accuracy and upon the care with which it is examined by the court officer. The degree of success in obtaining a full and accurate inventory which has been carefully audited cannot be determined from the statutes. An incomplete inventory may result in items being unknown to the

¹Woerner, American Law of Guardianship (1897), p. 318.

court throughout the term of guardianship, and even dissipated by guardians who are never made to account for them. Infants are rarely fully aware of the contents of their estates. In any particular case, there may be no interested parties who report the missing items to the court. The inventories should indicate the condition of the investments so that necessary changes can be ordered immediately without waiting for the accounting to be made one year after appointment. Some official or department of the court should be fully acquainted with the estates of wards and their condition.

Twenty-two states and the District of Columbia¹ require the return of an inventory within three months after the appointment and giving of bond. These states are Alabama,² Arizona,³ California,⁴ Delaware,⁵ Idaho,⁶ Indiana,⁷ Maryland,⁸ Massachusetts,⁹ Minnesota,¹⁰ Montana,¹¹ Nebraska,¹² New Hampshire,¹³ New Jersey,¹⁴ North Carolina,¹⁵ North Dakota,¹⁶ Ohio,¹⁷ Oklahoma,¹⁸ South Dakota,¹⁹ Utah,²⁰ Washington,²¹ and Wyoming.²² South Carolina²³ requires a return in ninety days. Illinois,²⁴ Kentucky,²⁵ and Virginia²⁶ allow sixty days; Connecticut,²⁷ two months. Florida,²⁸ Kansas,²⁹ Nevada,³⁰ Pennsylvania,³¹ and Rhode Island³² prescribe

¹Sec. 1134.

²Sec. 8148.

³Sec. 4129.

⁴Code of Civil Procedure and Probate Code of California
(1931), chap. 3, sec. 1550.

⁵Sec. 3922.

⁶Sec. 7865.

⁷Sec. 3390.

⁸Chap. 93, sec. 164.

⁹Chap. 195, sec. 5.

¹⁰Sec. 8936.

¹¹Sec. 10422.

¹²Chap. 38, sec. 505.

¹³Chap. 300, sec. 1.

¹⁴p. 3832.

¹⁵Sec. 2138.

¹⁶Sec. 8895.

¹⁷Sec. 109ss.

¹⁸Sec. 1460.

¹⁹Sec. 3528.

²⁰Sec. 7833.

²¹Sec. 9907.

²²Sec. 7029.

²³Sec. 5545.

²⁴Chap. 64, sec. 12.

²⁵Sec. 2027.

²⁶Sec. 3665.

²⁷Sec. 4804.

²⁸Sec. 5891.

²⁹Chap. 38, sec. 208.

³⁰Sec. 9514.

³¹Sec. 1041.

³²Sec. 5671.

that the inventory be returned in thirty days; Colorado,¹ in one month. Iowa² allows only fifteen days. The first term after the property comes into the hands of the guardian is the time allowed for inventory in Arkansas,³ Missouri,⁴ and Tennessee.⁵ Maine,⁶ Michigan,⁷ and Oregon⁸ provide no definite time, the statutes stating only that return be made "when the judge directs." Louisiana⁹ requires that an inventory be started within ten days after application for guardianship is filed with the court and in that state the letters of guardianship cannot be issued until the inventory is returned and homologated by the family meeting. Georgia, New Mexico, Texas, Vermont, West Virginia, and Wisconsin have nothing in their statutes concerning the time of inventory return. Presumably, in these states also, it is left to the discretion of the judge.

Omission to file inventory is generally following by citation, and if this be unavailing, by attachment, fine, or imprisonment until the guardian has complied with the statute of his trust has been revoked.¹⁰ Violation of this statutory provision has been held to be a breach of the bond and authorizes suit thereon¹¹ or the removal of the guardian.¹² The court is able to compel compliance with its orders as in any civil case, and refusal to comply may be punishable as contempt of court. These avenues are open to the courts of any state, but, in general, the statutes concerning inventory are silent relative to enforcement. Delaware,¹³ however, specifies that neglect is contempt of court and is punishable by attachment and imprisonment. Connecticut¹⁴

¹Sec. 5281.

²Sec. 4182.

³Sec. 397.

⁴Sec. 8512.

⁵Sec. 12580.

⁶Chap. 80, sec. 14.

⁷Sec. 15775.

⁸Chap. 11, sec. 1306.

⁹Sec. 321.

¹⁰Kimmel v. Kimmel, 48 Ind. 203 (1874).

¹¹Fuller v. Wing, 17 Me. 222 (1840).

¹²Barnes v. Powers, 12 Ind. 341 (1859)

¹³Sec. 3092.

¹⁴Sec. 4804.

provides that the failure to return inventory shall not be fined more than twenty dollars for each month of delay. The statutes of some states indicate that an extension of the time may be had with the permission of the judge or court. The time allowed seems liberal enough, and permission to extend it might be abused by a careless court.

Although all the states require an inventory as a condition of the bond or by special provision, only twenty-eight make special statutory provisions for the appraisement of the estate. These states provide for court appointment of one or more "disinterested," "impartial," or similarly described appraisers, require them to be "sworn to their trusts," or demand appraisement as of the estates of deceased persons, which amounts to the same thing. The number of appraisers varies in different states. Arizona, Nevada, New Hampshire, North Dakota, and Oregon require three; South Carolina, three or more; Louisiana, two; Vermont, Wisconsin, and Wyoming, two or more; Maine, Massachusetts, and Rhode Island, one or three. New Jersey and Oklahoma require appraisers, but do not specify the number. Arkansas, Idaho, Iowa, Kansas, Minnesota, Montana, Nebraska, Oklahoma, Oregon, South Dakota, Utah, and Wisconsin provide for appraisals as of the estates of deceased persons. The appraisal procedure for the estates of deceased persons varies among the several states in the way the appraisal requirements for guardians do. With two exceptions, the details of appraisal need no further description, but sight must not be lost of the fact that a requirement for appraisement is wholly absent in many states.

In two states, Delaware¹ and Maryland,² the court utilizes the inventory and appraisal for purposes other than a record of the ward's estate. There the appraisers are charged by the court to look into the condition of the estate and make recommendations for its administration. At its discretion the court orders the guardian to carry them out. The statute of Delaware provides:

"Upon the appointment of a guardian, if the ward have any real estate, the court shall be an order direct three judicious and impartial persons to view such real estate, estimate its yearly rental value, and note the buildings, orchards, fences, and other improvements, the estimated portion of cleared land and woodland and of meadow and marsh, whether any and what repairs are necessary to the tenable condition of the premises and

¹Sec. 3922.

²Chap. 93, sec. 164.

the probable cost of repairs and whether any and what improvement other than repairs, would be of benefit or advantage to the minor, and the probable cost of such improvements, and make return to the court under their hands.

"The return, if confirmed, shall authorize the guardian to do the repairs recommended therein, but the court shall have discretionary power in regard to the improvement recommended and may order the guardian to make such improvements, or so much of them, as the court may deem proper, and for this purpose may appropriate a specified sum out of the capital of the minor. The return shall not be conclusive to charge the guardian at all events with the estimated rental, value, but only if by due diligence he may receive so much, and if by such diligence he shall receive much more, he shall account therefor. But if the guardian shall occupy and cultivate the land of his ward, he shall, in all cases, be responsible for such estimated yearly rental value. But the court may for cause, set aside the return and may make orders for the same purpose." The provision in Maryland is similar except that two "discreet persons not related to either party" are appointed instead of three, and they are charged with the appraisal of the personal estate as well, "including the annual value of working beasts, stock, and utensils, set down in writing, dwelling houses, out-houses, orchards, gardens, meadows and enclosures and other improvements and the proportion in woods, etc." These exceptions reflect a period of agricultural rather than industrial economy and may not be of great importance in present practice. They are given here to indicate a possible aid the court might have in supervising guardianships in the absence of better means.

Under present conditions where no administrative officers are attached to the court or provided elsewhere for the supervision of guardianships of the person or estate, the contributory or paid service of appraisers might be used to great advantage by the court in giving directions at the inception of guardianships. Better still would be administrative officers in connection with probate and other courts who would give continuous supervision and assist the judge or court with the guardianship of the estate.

Bond.—Before entering upon his duties, a guardian must "take and subscribe an oath or affirmation" before the judge or court appointing him that he will "faithfully perform the duties of guardian to his ward, according to law and the best of his ability." Before guardianship letters are issued, a guardian, except a testamentary one who has been excused by will, must give

the bond required by the judge or court. The giving of bond is almost exclusively associated with the guardianship of property. The few instances where a bond occurs with guardianship of the person will be reserved for the moment. The bond, which is presumably based on a rough estimate of the value of the estate, is supposed to cover any loss resulting from mismanagement of the estate and may be sued upon for that purpose. Sureties,--two or more persons or one corporate surety,--approved by the court, must guarantee the bond. While the corporate surety may have greater financial security, it does not provide the personal interest which personal sureties take in the administration of guardianship for their own protection, nor can the corporate surety give the intimate acquaintance with the Guardian and Ward which a personal surety is likely to have. To insure adequate protection, a few states make the judge or clerk of court liable for any loss due to insufficient or unreliable bond. In all the states, additional bond and new or additional bond may be required at any time. Any surety may ask the court to be relieved, should he fear loss either because of the guardian's mismanagement or the guardian's own financial insecurity. Upon such a request, the judge cites the guardian to appear and show cause why new sureties should not be required. Failure to give bond in the first place or failure to comply with any demand of the court for new or additional bond is contempt of court and cause for removal.

Although some states merely prescribe a bond conditioned on the faithful discharge of duties, it is usual for the statutes either to include a copy of the bond in full or to state the conditions of the bond. These latter are usually in three or four parts. The following is a typical statutory section on bond:

"(1) To make a true and perfect inventory of all real and personal estate of the ward that shall come to his possession of knowledge, and to return the same into the court at such time as the court directs;

"(2) to dispose of and manage all such estate and effects according to law, and for the best interest of the ward, and faithfully discharge his trust as such guardian;

"(3) to render an account on oath of the property in his hands including proceeds of real estate which may be sold by him and of the management and disposition of such property within one year after his appointment and at such other times as the court directs;

"(4) and at the expiration of the trust, to settle his accounts with the court, or with the ward, or his legal representatives, and to pay over and deliver

all the estate and effects remaining in his hands, or due from him on such settlement, to the person who shall be lawfully entitled thereto."

The statutes prescribe that bond be given to the state, the minor, the judge or the court, or they may fail to name to whom the bond shall be given.¹ In Arkansas, Connecticut, Indiana, Kentucky, Maryland, North Carolina, North Dakota, Ohio, Oregon, Tennessee, and Washington, the bond is given to the state; in Colorado and Illinois to the people of the state; and in the District of Columbia, to the United States. Arizona, California, Delaware, Montana, Nevada, Oklahoma, South Dakota, and Wyoming specify that bond be given to the minor. Alabama, Massachusetts, Nebraska, New Hampshire, South Carolina, and Wisconsin direct the bond to be given to the judge; Georgia, the Ordinary or his successors; Rhode Island, the court. The remaining states do not specify to whom the bond shall be given, although they too probably have some regular or conventional procedure.

More than half the states require bond with one or more approved sureties in sufficient sum and penalty, as the judge or court orders. A variety of particulars as to amount and penalty are written into the statutes of the other states. Twenty-five states, Arizona,² Connecticut,³ Delaware,⁴ Florida,⁵ Georgia,⁶ Idaho,⁷ Kentucky,⁸ Maine,⁹ Massachusetts,¹⁰ Michigan,¹¹ Montana,¹² Nebraska,¹³ Nevada,¹⁴ New Hampshire,¹⁵ New Jersey,¹⁶ Oklahoma,¹⁷ Oregon,¹⁸ Pennsylvania,¹⁹ Rhode Island,²⁰ South Dakota,²¹ Texas,²²

¹Citations are the same as those following.

²Sec. 4110.

³Sec. 4800. Sureties must be residents.

⁴Sec. 3917.

⁵Sec. 5886.

⁶Sec. 3046.

⁷Sec. 7849.

⁸Secs. 2017, 2018.

⁹Chap. 80, sec. 12.

¹⁰Chap. 205, sec. 1.

¹¹Sec. 15775.

¹²Sec. 10408.

¹³Chap. 38, sec. 110.

¹⁴Sec. 9501.

¹⁵Secs. 1177, 1179.

¹⁶Sec. 49, p. 3829.

¹⁷Secs. 1443-44.

¹⁸Chap. 11, sec. 1306.

¹⁹Sec. 1027.

²⁰Sec. 5626.

²¹Secs. 3489, 3500.

²²Sec. 4125.

Washington,¹ West Virginia,² Wisconsin,³ Wyoming,⁴ and the District of Columbia⁵ leave the amount of the bond to the discretion of the court, judge or clerk appointing the guardian. The most frequent additional specification is that the sum of the bond as required by the judge or clerk be not less than double the amount of personal property and the annual rents and profits of the real estate. This is done in California,⁶ Colorado,⁷ Iowa,⁸ Kansas,⁹ New Mexico,¹⁰ North Carolina,¹¹ North Dakota,¹² and South Carolina.¹³ The bond in Arkansas¹⁴ and Tennessee¹⁵ must be in penalty double the value of the ward's estate, personal and real. The remaining states vary in their requirements for bond. Alabama¹⁶ demands an amount twice the personalty and twice three years rental of the real estate; Indiana,¹⁷ twice the personalty and four times the annual rents and profits; Illinois,¹⁸ double the personalty and six times the gross income of other property. Louisiana¹⁹ demands that the "sum be equal the amount of credits, money and moveable effects and such other sum as the judge believes

¹Sec. 9905.

²Chap. 44, Art. 10, sec. 5.

³Chap. 319, sec. 05.

⁴Sec. 7081.

⁵Sec. 1131. (Corporations excepted).

⁶Code of Civil Procedure of California (1931), sec. 8135
(the value alone if bonded by a surety company).

⁷Sec. 5242.

⁸Sec. 12577.

⁹Chap. 38, sec. 207.

¹⁰Chap. 62, sec. 109 (only the value plus 10 per cent if bonded by a surety company).

¹¹Sec. 2162. (If the estate is over \$100,000. the bond must be only the value plus 10 per cent instead of double.)

¹²Secs. 8925, 8685.

¹³Sec. 5543.

¹⁴Sec. 34178.

¹⁵Sec. 8477.

¹⁶Sec. 8135.

¹⁷Sec. 3383.

¹⁸Chap. 64, sec. 7.

¹⁹Sec. 317.

sufficient to cover loss and damage from bad administration." Maryland¹ requires a penalty not in excess of the probable value of the estate. Ohio² specifies that the sureties must be freeholders and that the bond must be in sum and penalty double the personalty and double the gross amount of rents that will probably be paid during the entire minority of the ward. Minnesota,³ Mississippi,⁴ and Missouri⁵ require oath and bond but make no demand as to the amount, although the last state requires that the sureties own property double the value of the ward's estate. The Texas statute orders only that the amount of the bond be included in the order of appointment entered on the minutes of the court. If a father has the custody of a ward in Vermont,⁶ the bond need only cover the principal of the estate; otherwise the principal plus the income. Illinois, Maryland, North Carolina, Ohio, and the District of Columbia provide that one bond be sufficient for several wards interested in the same estate. Alabama, Florida, Illinois, Kentucky, North Carolina, and Virginia include clauses stating that the judge or clerk is liable on his official bond for taking insufficient or improper bond of guardians. Nevada⁷ excuses guardians from bonds if there are no assets. Maine,⁸ in the section concerning the bond, limits the penalty for embezzlement of wards' estates to not more than \$5000. or 10 years imprisonment.

It is frequently a condition of the bond that the guardian must fulfill his trust in relation to the care, custody, and education of his ward. This is applicable only when the guardian is guardian of both person and property, since with two exceptions, no reference is made to bonds except those for the protection of property. Iowa⁹ provides that bond and oath may be required of a guardian of the person. Ohio¹⁰ specifies that the bond of a guardian of the person be double the probable expenses of maintaining and educating the minor during one year. In addition, some states include the following section of their statutes:

"When any person is appointed guardian of a minor, the court or judge, may with the consent of such person, insert in the order of appointment conditions not otherwise obligatory, providing for the care, treatment, education and welfare of

¹Chap. 93, secs. 159, 161.

²Sec. 10920.

³Sec. 8932.

⁴Sec. 1869.

⁵Sec. 396.

⁶Secs. 3665, 3666.

⁷Sec. 9501.

⁸Chap. 80, sec. 12.

⁹Sec. 12579.

¹⁰Sec. 10923.

the minor. The performance of such conditions shall be a part of the duties of the guardian, for the faithful performance of which he and his sureties on his bond shall be responsible."

This is found in Arizona,¹ California,² Idaho,³ Michigan,⁴ Minnesota,⁵ Oklahoma,⁶ South Dakota,⁷ and Wyoming.⁸

The appointment of a guardian without the taking of bond has been held invalid in some states, valid in others. Whether valid or not, a person is held responsible for his acts as guardian. The liability of judges for failure to take bond or sufficient bond which is written in the statutes of some states, if copied by the remaining states, might reduce this unfortunate occurrence. Guardianship of minors differs from executorship and it is recommended that testamentary guardians not be excused from giving bond. Wards of testamentary guardians need the same protection given to other wards. A child's father cannot be appointed guardian of his estate without giving bond. It seems unreasonable that a father should be able to excuse another of a condition from which he himself is not excused, even if it is in connection with the administration of an estate left by him. No attempt is made here to go into the law of suretyship, which is a branch of the law by itself.

Sufficient bonds based on correct inventories offer great protection to minors and their estates. Liability on their bonds perhaps deters some guardians from entering into speculative investments with their ward's money, or mingling it with their own or even misappropriating it. This fact alone probably justifies the requirement of bond. Furthermore, when damage and loss is shown to the court, the bond offers a ready source of reimbursement. It must be remembered, however, that bonds cover only those losses which are discovered by the court or are brought to its notice. There is no doubt that minors' estates have been dissipated and lost to them forever without the fact ever being known to the court or any person in such a way as to make suit possible. The full advantage and protection of bonds cannot be had without careful supervision of estates by an administrative officer or department of the court.

Bonds should be based on a "full and perfect" inventory,

¹Sec. 4112.

⁵Sec. 8934.

²Sec. 1512.

⁶Sec. 1444.

³Sec. 7850.

⁷Sec. 3500

⁴Sec. 15775.

⁸Sec. 7019.

and this ought to precede the giving of bond instead of follow it several months later. The great variety of bond requirements do not justify themselves and uniformity throughout the states on this point, is, therefore, recommended.

Unless social service supervision can be provided for the guardians of the persons of minors, a bond sufficient to cover the allowance for support and education for one year might properly be required of them, when they hold this office apart from that of guardian of the estate. On the other hand, without social service supervision, collections on such bonds would be negligible, and bonds are costly to minors.

Settlements and Accountings

One of the measures by which the court keeps in touch with guardianship administration is the filing of accounts. These intermediate statements of the condition of the estate enable the court to supervise guardianship. These accountings, regular or occasional, are at present the only positive social control over guardianship other than court proceedings to remedy specific abuses. The supervision, even when it is more than the casual approval and filing of a financial statement, rarely extends to the social implications in the situation. The opportunities which the time of accounting presents have not been utilized. The court can consider once more the guardian in all his relations and judge his success in the business and personal aspects of his duty. Direction and advice need not wait until the mismanagement of the estate is brought to the attention of the court by complaint or the personal relationships have become actually harmful. The time of accounting is a convenient occasion for verifying the sufficiency of bond and surety. Unwise investments can be ordered to be changed. Excessive or injudicious expenditures can be controlled at this review of the guardianship. The accounting enables the guardian to seek and obtain advice in outlining the budget and in making plans for the administration of the estate and in guiding the ward in his development.

Throughout the states, accountings or partial settlements are required. After the appointment of the guardian, the giving of bond, and the return of inventory, and continuous oversight of guardians and wards by the court depends entirely upon these accountings, unless a friend of the ward petitions for a special accounting or a surety on the bond seeks release from his suretyship. The purpose of accountings has been stated thus:

"These intermediate accounts are not so much for the purpose of adjudicating the respective rights and liabilities between guardians and wards (which is not accomplished until

final settlement of the guardian's accounts) as to compel him to furnish evidence to the court and to the public as to the condition of the estate, its liabilities and resources, the propriety of orders touching investments of the funds, and sufficiency of the bond, the necessity of selling personalty or real estate and like matters of valuable information touching the safety of the trust estate."¹

The value of these reports depends, of course, upon the scrutiny and consideration given them by judges and clerks and the use made of them in directing guardians.

The filing of accounts is advantageous to guardians as well as wards. After an account is filed and accepted or passed upon, it becomes prima facie evidence² of satisfactory administration up to that date. Although it may be reviewed and corrected at any time before final settlement and is subject to full examination and review on the occasion of the final settlement, an approved account is not subject to collateral attack, and in the event of any attack, the burden of proof is on the party attacking. The time of accounting is also convenient for obtaining orders to disburse more than the income of the estate when that becomes necessary. The utilization of these accounts cannot be determined from reading the statutes; variation, however, can be seen even there. In summarizing this phase of guardianship procedure, three contrasts among the states will be presented: the difference in the frequency of accountings, in the degree of detail in the directions and in the methods and penalties used in enforcing these temporary settlements.

Regardless of the intervals prescribed for accountings, nearly all the states require a first accounting to be made one year after appointment. The statutes of the various states refer to accountings as statements, inventories, partial settlements, and reports. The most frequent interval between accountings is a year. Annual accounts are required by statute in Arizona,³ Arkansas,⁴ Connecticut,⁵ Florida,⁶ Georgia,⁷ Idaho,⁸ Iowa,⁹

¹Woerner, American Law of Guardianship (1897), sec. 96.

²Austin v. Lamar, 23 Miss. 189 (1852); Willis v. Fox, 25 Wis. 646 (1870); Cogswell v. State, 65 Ind. 1 (1879); Jenkins v. Whyte, 62 Md. 427 (1884); Starrett v. Jameson, 29 Me. 504 (1848); Schnieder v. Burns, 45 La. Ann. 875 (1893).

³Sec. 4129.

⁷Sec. 3059.

⁴Sec. 4221.

⁸Secs. 7865, 7866.

⁵Sec. 5354.

⁹Sec. 12597.

⁶Secs. 5892, 5546, 5547.

Kansas,¹ Louisiana,² Maryland,³ Massachusetts,⁴ Michigan,⁵ Minnesota,⁶ Mississippi,⁷ Missouri,⁸ Nevada,⁹ New Mexico,¹⁰ North Carolina,¹¹ North Dakota,¹² Oklahoma,¹³ Rhode Island,¹⁴ South Carolina,¹⁵ South Dakota,¹⁶ Tennessee,¹⁷ Texas,¹⁸ Utah,¹⁹ Vermont,²⁰ Virginia,²¹ Wisconsin,²² and the District of Columbia.²³ North Dakota, South Dakota, and Utah further prescribe that when estates are valued at more than \$20,000. accounts must be rendered semi-annually. Otherwise Colorado²⁴ alone requires guardians to account more frequently than once a year. There, accounts must be filed six months thereafter unless dispensed with by court order. Accountings must be returned every two years or oftener in Delaware,²⁵ Indiana,²⁶ Kentucky,²⁷ Ohio,²⁸ and Washington.²⁹ "As often as once in three years" is the requirement in Alabama,³⁰ Illinois,³¹ Maine,³² New Hampshire,³³ New Jersey,³⁴ and Pennsylvania.³⁵ After the first accounting, California,³⁶ Montana,³⁷ Nebraska,³⁸ and Oregon³⁹ provide for accountings whenever the judge calls for them. In the remaining states the statutes are silent as to the intervals between accounts. Guardians in

¹Chap. 38, sec. 22.

²Secs. 356, 359.

³Chap. 93, secs. 170, 187.

⁴Chap. 205, secs. 1, 2.

⁵Sec. 15795.

⁶Sec. 8948.

⁷Secs. 1888-89, 1891.

⁸Secs. 420-425.

⁹Sec. 9501.

¹⁰Chap. 62, sec. 122.

¹¹Sec. 2186.

¹²Sec. 8895.

¹³Sec. 1461.

¹⁴Sec. 5678.

¹⁵Sec. 5544.

¹⁶Sec. 3528.

¹⁷Secs. 8514, 8517.

¹⁸Secs. 4224-27.

¹⁹Sec. 7833.

²⁰Sec. 3706.

²¹Sec. 5408.

²²Chap. 319, sec. 11.

²³Code of Dist. of Columbia
to 1929, Sec. 55, p. 147.

²⁴Sec. 5354.

²⁵Sec. 3092.

²⁶Sec. 3390.

²⁷Sec. 2037.

²⁸Sec. 10933.

²⁹Sec. 9907.

³⁰Secs. 8202-8204.

³¹Chap. 64, secs. 14, 16.

³²Chap. 80, sec. 24.

³³Chap. 289, sec. 5.

³⁴Sec. 3852.

³⁵Sec. 1043.

³⁶Sec. 1553.

³⁷Sec. 10423.

³⁸Chap. 38, sec. 110.

³⁹Chap. 11, sec. 1306.

Wyoming¹ account only when the judge directs. West Virginia² provides only that the circuit court in chancery may require settlements of guardian's accounts. There are two exceptions to the regularity prescribed by the statutes: if the estate is valued under \$500.00 in Connecticut, annual accounts need not be rendered unless the judge orders; if the income is not over \$50.00, accounting is excused in Maryland. At any time special accountings may be ordered by the court upon its own volition or upon the petition of some interested person. It should be stated that New York, the only state omitted in the preceding remarks, makes no reference to the filing of periodical accounts.

A description of what the account should present appears in only a few states. Although the details, when given vary from state to state, they are about the same in substance. The most similar descriptions are given in the laws of Indiana, Ohio, Vermont, and Washington. In these four states guardians must render to the court appointing them an "account of the receipts and expenditures of the ward's income verified by vouchers or proof; an itemized statement of the funds of the ward's estate; the date, and nature of their investment; the security thereof; and the rate of interest accruing." Utah prescribes an itemized inventory covering all receipts and disbursements and a full description of the administration of the estate since the last accounting. In Arkansas, the statute calls for a "full statement as to the application of funds"; in Nevada, "proceeds derived from management and disposition of the estate"; in Tennessee, "the profits and disbursements"; and in Iowa, "all money in possession and interest accrued." Three schedules for classifying the kinds of property appear in the Massachusetts laws. Missouri provides that the guardian make a "statement of the application of the ward's money spent for education, support, and the money spent otherwise on the estate." Georgia, like several of the colonies in the early days, names a particular date when accounts are to be returned to the court. There "every guardian within twelve months of his appointment and by the first Monday in July in every year thereafter shall make a return to the ordinary under oath, making an accurate exhibit of all the property received by him up to that time and since the last return, together with an account current of his receipts and expenditures, accompanied with the vouchers for the same, and any other matter connected with the said property. . . ." Texas gives the most extensive directions for accountings; they are required of both

¹Sec. 7018.

²Chap. 44, Art. 10, sec. 13.

guardians of the person and those of the estate. The guardian of the person must annually return to the court his sworn account showing each item of expenditure for education and maintenance of his ward since the last account. The guardian of the estate must show:

1. Any property that may have come to his knowledge belonging to the ward which has not been previously inventoried or listed.
2. Any changes in property not previously reported.
3. Complete account of receipts and disbursements since last annual account.
4. All claims that have been allowed by him against the estate since the last account that are still unpaid.
5. All claims that have been rejected by him since the last account and whether the same have been sued upon or not.
6. Money and property still on hand; condition of and use of property.
7. Other facts as may be necessary to show the true and exact condition of the estate.

Annexed to the account is required a certificate of an executive of any bank or trust company in which the money on hand is deposited showing the amount. The other thirty-five states and the District of Columbia are silent in their statutes as to what the partial settlement should include. Regardless of the details included in the statutes, the proper fullness must, in actual practice, rest with the judge or clerk.

Other specifications in the statutes relate to notice and hearing, auditing, verification and recording of accounts. Alabama, New Jersey, and Pennsylvania specify that there be notice and hearing and auditing of these partial settlements, Alabama requiring a guardian ad litem to represent the ward in the examination of the accounts. Arizona requires intermediate accounts to be returned with the affidavit of the guardians. In Georgia, "the returns shall be examined by the ordinary and if found correct shall be allowed by him and entered of record with vouchers and the judgment of the ordinary shall be prima facie evidence of correctness." Special books for the purpose of keeping guardian's accounts are provided for in Delaware and Missouri. Accounts are also prima facie evidence of the administration up to the date of filing in Kentucky. They are returned "contradictorily" with the under-tutor in Louisiana. In Mississippi, accounts must be examined and allowed by the court before filed as complete and guardians with several wards must keep the accounts separately. Before accounts are considered completed in Virginia, the names of guardians and wards whose accounts are being considered must

be posted on the front door of the court house for three weeks. When an account is presented in Texas, it is filed and the filing thereof noted on the judge's docket where it remains for five days before being acted upon. After five days, the judge may act or may continue the hearing. The guardian must produce and file proper vouchers for each item of credit claimed by him or support the same by satisfactory evidence. If found correct, the account is approved by an order of the court; if incorrect, it must be corrected. In addition to Georgia which requires accounts to be filed before July 1st of each year, a few other states specify the time for filing accounts. In Florida they must be filed before June 1st of each year; in Virginia, within six months after the end of every succeeding year from the date of appointment; and in Wisconsin, sixty days after December 31st and thirty days after being ordered by the court.

Since accounts are required of guardians, courts can compel them to be returned. A considerable number of states, however, include in the statutory section on guardian's accounts, some method for compelling or some penalty for not reporting or both. Statutes in Missouri, Tennessee, and Utah merely state that the court may compel guardians to account. Arkansas, Delaware, Illinois, and New Mexico allow attachment and imprisonment. Neglect or refusal or account after citation is contempt of court in Florida, Tennessee, Indiana, Iowa, Ohio, Rhode Island, Virginia, and Washington penalize guardians for neglect or refusal by giving them no allowance or commission for their services, or causing them to forfeit the same. Liability on the bond is included in Indiana, and Washington, and the latter state adds a further liability or damages of 10 per cent of the whole estate. Rhode Island makes guardians "accountable for the full value of the estate." Iowa and Missouri make them subject to removal, as do most of the other states in their provisions for removal of guardians. Guardians may be fined not more than \$50.00 in Iowa and not more than \$100.00 in Missouri for delinquency in returning the required periodical account. In Texas, when an account is not returned, the guardian is cited to make a return at the next term of court and ordered to show cause for the failure. If he fails after citation or fails to show good cause for failure, he may be fined by the court not exceeding \$500.00 for the use of the county, and he and his sureties are liable for any fine imposed and all damages sustained by reason for the neglect. New Hampshire causes guardians to forfeit \$20.00 for every thirty days neglect.

Periodical accountings are purely statutory and therefore must comply with statutory requirements, but informalities may be

excused if the interests of the ward are duly protected.¹ The burden of proof is upon the guardian for establishing any payments alleged to have been made by him. It must be remembered, however, that the value of these periodical returns depends entirely upon the local judicial administration and not upon particulars written into the statutes. If the accounts are filed without examination or examined and audited carelessly, they are practically worthless except for the fact that they are fairly conclusive as against the guardian and may be used in a later review of his guardianship. Their real purpose should be the facilitation of the court's continuing supervision over guardians and wards. For this purpose, an interval of three years between accountings is altogether too long. With few exceptions, the reports ignore the guardianship of the person. Wisconsin requires guardians of the person to report the number of days the ward attended school during the preceding year. In a few states, the allowances for maintenance and education are determined in advance at this time. No comprehensive study has been made of the strictness with which these requirements are carried out by local courts. Some information can be obtained from the experience of the Veteran's Administration Guardianship division.² The experience of this organization has been valuable and enlightening on guardianship administration throughout the country. It reports a general delay in procedure in the local courts, and states that courts and juries usually look with disfavor upon the prosecution of a guardian who fails to account for funds when that guardian happens to be a member of the ward's family. Some courts even refuse to remove guardians or force restitution of misappropriated funds in cases in which guardians had mismanaged the estates. This Federal organization now has some power to enforce periodical accounts, by holding up the payments until the accounts are returned. In 1924, the year in which the guardianship subdivision of the service was established, a form asking what was the amount of bond, whether the guardian had accounted in accordance with the law of his state, whether the account was approved by the court, and what the balance of the last account was sent to all the guardians of beneficiaries. Many forms were never returned, but those which were disclosed that in many cases guardians had not accounted since their appointment three or four years before, and that, particularly where members of the family had been appointed, no evidence existed to show how the money had been spent, because they had

¹Cheney v. Roodhouse, 135 Ill. 257, 25 N.E. 1019 (1890).

²Kouschuetsky, op. cit., pp. 53, 44, 45.

not expected to ever be called upon to account. Insofar as the courts are concerned, these guardianships are like all others. It seems reasonable, therefore, to believe that such disclosures represent something of an average of administration insofar as periodical accountings are concerned. Since 1928, most of the states have passed the Uniform Veterans Guardianship Act which calls for annual accountings. But, in 1932, the requirement of annual accountings was waived by the Veterans' Administration and now the state requirements, whether one or three years, are in force. This is a regrettable step backwards in the improvement of the guardianship of these beneficiaries.

It is impossible to estimate the saving to wards which would result from the courts promptly requiring and carefully examining guardians' accounts. Such requirement and examination would require a staff of trained persons. If guardians knew that their accounts would be called for annually, investigated, and examined without fail, many would be deterred from careless or even fraudulent administration of their trusts.

Final Settlement

Before considering the legal provisions for final settlement, attention should be given to the significance of this requirement. It is the time when the entire period of guardianship is reviewed. It is the real adjudication of the guardianship. It is the proper time for the recovery of loss while jurisdiction is still in the court. After the discharge of a guardian more expensive litigation would be necessary. At this time the burden of proof of good faith and honest management is on the guardian. After he and his sureties are released, the burden of proving bad faith is on the ward. At the final settlement the estate passes into the hands of the ward, or his representative, or into the hands of a new guardian, if the ward has not attained majority. The settlement should, therefore, be not merely the transfer of the estate but it should offer a clear presentation of the condition of the estate. Where possible an explanation of the condition of the estate and council regarding it should be given to the ward. A study of final settlements compared with initial inventories would reveal the measure of success of guardianship and indicate points at which supervision had been unwise or inadequate. Permission for the guardian to settle privately with the ward at the termination of the guardianship seems entirely inconsistent with the duty vested in the court to guarantee the protection of the ward. The final settlement can give no attention to the personal aspects of the relationship. It is, of course, too late to accomplish anything more than to see that the

ward comes into his own.

At the termination of the guardianship, whether by reason of the ward's majority or otherwise, the guardian must make a final settlement with the court, the ward, or the ward's representative. The extent to which statutory directions for final settlement are given varies among the states, but, with few exceptions, the directions are very limited. Arizona,¹ Idaho,² Maine,³ Massachusetts,⁴ Michigan,⁵ Montana,⁶ Nebraska,⁷ Nevada,⁸ Oregon,⁹ South Dakota,¹⁰ Washington,¹¹ Wisconsin,¹² and Wyoming,¹³ provide for final settlement only as a condition of the bond. This bond requirement related to final settlement by a guardian usually reads:

"and at the expiration of the trust, to settle his accounts with the court, or with the ward, or his legal representatives, and to pay over and deliver all the estate and effects remaining in his hands, or due from him on such settlement, to the person or persons who shall be lawfully entitled thereto."

It is impossible to determine from this requirement whether any definite procedure is followed in making final settlement. It may be that the guardian can settle with the ward or his representatives without any examination, auditing, or approving of the accounts by the court. Many courts in these states may supervise the final settlement carefully as a part of their general responsibility and authority over Guardians and Wards. The statutory requirements, however, do not make this necessary.

A number of states place the responsibility of final settlement more directly on wards after they attain majority. California,¹⁴ Ohio,¹⁵ Oklahoma,¹⁶ and Utah provide that when the ward reaches majority he may settle with his guardian and give him a release which is valid if obtained fairly and without undue influence. California makes the provision, however, that the termination of the relation of Guardian and Ward by the death of either or by the ward's majority shall not cause the court to lose jurisdiction over the settlement of the guardian's accounts.

¹Sec. 4110.

²Sec. 7842.

³Chap. 80, sec. 12.

⁴Chap. 206, sec. 24.

⁵Sec. 15775.

⁶Sec. 10468.

⁷Sec. 9501.

⁸Chap. 11, sec. 1306.

⁹Chap. 38, sec. 110.

¹⁰Sec. 3499.

¹¹Sec. 9907.

¹²Chap. 319, sec. 05.

¹³Sec. 7018.

¹⁴Secs. 1555, 1592.

¹⁵Sec. 10954.

¹⁶Sec. 6954.

This means that the court can assert its authority when it sees fit, but that the court's participation is not stipulated by law. In Ohio, the settlement is final unless an appeal is taken to the common pleas court. Tennessee¹ provides that every minor upon reaching twenty-one, upon receipt of money or estates due, shall receipt to his guardian. The clerk of court records the receipts. Arkansas² and Florida³ also expect the ward to receipt the guardian, but the statutes of these states mention some participation of the court in final settlement. In Arkansas, "wards having received all shall acknowledge in the proper court and if the ward refuses or fails after notice, the court may discharge the guardian." In Florida, "the minor is entitled to full settlement of all guardianship funds and upon receipt of them, the ward shall receipt and fully release his guardian." The judge discharges finally and with letters both guardian and sureties from further liability.

Alabama,⁴ Colorado,⁵ the District of Columbia,⁶ Illinois,⁷ Minnesota,⁸ New York,⁹ Pennsylvania,¹⁰ and Vermont¹¹ provide that the guardian shall settle with or exhibit an account with the court at the expiration of his trust. Alabama, Colorado, and Minnesota provide for definite accounting with notice, passing of the accounts, and decree of settlement, the first state requiring the appointment of a guardian ad litem to represent the ward. Upon cessation of authority, guardians and curators in Missouri¹² must file a final account in the court having jurisdiction, deliver a copy of it with notice to the ward or succeeding guardian four weeks before the first day of the next term of court. On a set day, the court proceeds to examine the accounts, correct errors and make final settlement or continue it until it can be satisfactorily settled. Delaware¹³ provides that, at the termination of guardianship, the court orders any property in the guardian's hands to be delivered to the ward. In Maryland,¹⁴ the guardian must exhibit a final account. New Mexico¹⁵ provides that

¹Secs. 8538, 8539.

²Sec. 4222.

³Sec. 5933.

⁴Secs. 8208-12.

⁵Sec. 5364.

⁶Sec. 1139.

⁷Chap. 64, secs. 15,16.

⁸Secs. 8949-51.

⁹Chap. 41, sec. 83.

¹⁰Sec. 1050.

¹¹Vermont Laws of 1923,
Amending. sec. 3706.

¹²Sec. 430.

¹³Sec. 3924.

¹⁴Sec. 199.

¹⁵Chap. 62, sec. 117.

the "court has power to order any property that may come into the possession of a guardian and shall be in his possession at the termination of the trust to be delivered to the ward or his administrator and to enforce the same by attachment and imprisonment." This provision does not show whether this is the customary procedure or not or whether the guardian cannot settle privately with his ward. In North Carolina,¹ a guardian may be required to file a final account at any time after six months from the ward's coming of full age or the cessation of the guardianship. The final account is filed and recorded by the clerk. In Rhode Island,² "when the guardian has paid over to persons entitled all property as required by a decree of the court and the account has been approved satisfactory, the guardian shall be allowed final discharge and the order recorded." A final account at the expiration of tutorship or whenever ordered by the judge is required in Louisiana³ and any balance bears interest from the date of closing the accounts. The decree of final settlement shall be conclusive on all parties and shall exonerate and forever discharge the guardian in New Jersey.⁴ In Georgia,⁵ a ward or a new guardian may apply for an order requiring the guardian to appear and submit to a final settlement; citation is to be returned at the next term of court. It is difficult to determine from these statutory requirements what degree of supervision is given final settlement by the courts.

It is even more difficult to determine from the laws of the remaining states what role the court plays in the final settlement. In Indiana,⁶ Kentucky,⁷ and West Virginia,⁸ it is the duty of the guardian at the expiration of the trust to account for and pay over to the proper person all the estate remaining in his hands. Kansas⁹ provides only that a guardian must make a final accounting, and close the estate when the minor reaches majority. New Hampshire¹⁰ does not separate requirements for final settlement from those for periodical accountings. Iowa¹¹ fails to mention final settlement as such, but provides that upon failure to deliver property to his successor the court may commit to jail until he complies and fine him \$100 for the benefit of the ward's estate. Guardians shall not be discharged in South Carolina¹²

¹Sec. 2188.

²Sec. 5620.

³Secs. 357, 360.

⁴Sec. 127, p. 3857.

⁵Sec. 3076.

⁶Sec. 3390

⁷Sec. 2037.

⁸Chap. 44, Art.10, sec. 7.

⁹Chap. 38, sec. 222.

¹⁰Chap. 289, secs. 5-8.

¹¹Sec. 12602.

¹²Sec. 171.

until they have finally accounted and given notice for at least a month in newspapers of the date of discharge. Mississippi¹ provides that the final account shall remain on file for the inspection of the ward who may be summoned to appear and show cause why it should not be allowed. This state, however, further provides that a ward of twenty-one may petition the court to waive final settlement. There is a requirement in Virginia² to post on the front door of the court house the names of the wards whose accounts are to be settled. If a guardian die, resign, or be removed in Texas,³ he or his representative are directed to account for and pay over the estate to his successors. Termination by majority is not included in this direction, and no provision is made for final settlement at this time.

A few states limit the time after final settlement when appeal can be made or when it can be reopened for review and correction. This does not apply to actions on fraud. Appeals from final orders must be made within six months in Missouri.⁴ In Arkansas⁵ and Kansas,⁶ one year is allowed. In Ohio,⁷ the subsequent guardian at any time during the ward's minority, or the ward within two years after final settlement may open the settlement for review by civil action in the common pleas court. Minors "can maintain an action not beyond four years after majority" in Louisiana.⁸ In some states, guardians appointed by the court are not entitled to discharge until one year after the ward reaches majority.

It has been held that a private settlement by a guardian with his ward shortly after majority will be closely scrutinized and the burden of proving good faith rests upon the guardian.⁹ To sustain a private settlement a guardian must show that he fully and clearly disclosed the condition of the ward's estate, that he exercised no undue influence, and that the settlement was fair

¹Sec. 1893.

²Sec. 5320.

³Sec. 4237.

⁴Sec. 437.

⁵Sec. 4226.

⁶Chap. 38, sec. 222.

⁷Sec. 10954.

⁸Sec. 362.

⁹Hardin v. Taylor, 78 Ky. 593 (1879); Kinter's Appeal, 62 Pa. St. 318 (1869)

and equitable.¹ However general this attitude of the court may be toward private settlements, very indifferent supervision is indicated by failure to require settlement before the court in the first place. Private settlements are not usually set aside unless the guardian was guilty of fraud or undue influence, especially where the ward acquiesces for a long time. A ward who has accepted a private settlement may not be aware of undue influence, but it may nevertheless exist. He may not become aware of the unfairness of his settlement until his guardian and sureties are discharged. His former guardian may be financially insolvent by the time injustice is known. The ward may not consider the possible adjustment he might obtain worth the risk he would have to take in bringing suit, paying attorney fees, or incurring the anger of the relative or friend who had been his guardian. It seems reasonable to regard the provisions of some of the states as not merely inadequate but unsatisfactory. One state makes no reference to final settlement in the statutes on Guardian and Ward. In a number of states, the requirement is included among the conditions of the bond and not elsewhere.

The necessity for settlement with and discharge by the court is not clearly stated in the laws of many states, nor is the time when final settlement should be made named. The process of requiring notice of final settlement is occasionally defective. Private settlements with the ward are permitted and are recognized as valid.

Final settlement before the court is a time when the entire guardianship is subject to examination and review. Certainly a final settlement should be compulsory. The periodical accountings are not final in any sense. Clearly, it is a dangerous policy to leave the final accounting to the ward. The court has not fulfilled its duty until it has reviewed the guardianship as a whole and brought it to a formal close. The impersonality of the court as well as its authority over Guardians and Wards enables it to supervise the close of guardianship in a way that is more effective and more objective.

Compensation of Guardians

In England, guardians, like executors, administrators, and trustees, must serve without compensation for their services, either at law or in equity;² but in the United States, statutory provisions permit a guardian to receive compensation, either in

¹Ivan Rees v. Witzenburg, 112 Iowa 30 (1900).

²Woerner, American Law of Guardianship, p. 516.

the form of a reasonable allowance or of a commission on the amount of receipts and disbursements as shown by their records. Services, however, which entitle him to compensation must be services he has authority to render. The rate of compensation is sometimes fixed by statute; more often it is left to the discretion of the court. The rate depends upon the amount of the estate, the trouble in managing it, and whether or not fees have been paid to counsel for assisting in administration.¹ Some statutes provide for special allowances. The statutory sections on compensation include allowances for expenses as well. This confusion renders the provisions difficult to understand fully. From the laws relating to compensation it is impossible to determine, except in a few instances, when the compensation is allowed; whether annually at the periodical settlements, when applied for, or only upon final settlement.

As already suggested, some states have copied verbally whole sections of statutes from other states. Any uniformity is welcome. Eighteen states have identical sections on the compensation of guardians:

"Every guardian must be allowed the amount of his reasonable expenses incurred in the execution of his trust, and he must also have compensation for his services as the court in which his accounts are settled deems just and reasonable."

This is the provision in Arizona,² California,³ Idaho,⁴ Illinois,⁵ Indiana,⁶ Massachusetts,⁷ Michigan,⁸ Montana,⁹ Nebraska,¹⁰ Nevada,¹¹ North Dakota,¹² Ohio,¹³ Oregon,¹⁴ South Dakota,¹⁵ Utah,¹⁶ Washington,¹⁷ Wisconsin,¹⁸ and Wyoming.¹⁹ California and Idaho provide additionally that a "guardian be also allowed all reasonable disbursements made after the legal termination of the guardianship, but while the relation, by consent or acquiescence, subsists in fact, and before the discharge of the guardian by

¹21 Cyclopedia of Law and Procedure, p. 173.

²Sec. 4130.

¹¹Sec. 9537.

³Sec. 1556.

¹²Sec. 8898.

⁴Sec. 7968.

¹³Sec. 10953.

⁵Chap. 64, sec. 43.

¹⁴Chap. 11, sec. 1331.

⁶Sec. 3415.

¹⁵Sec. 3531.

⁷Chap. 206, sec. 16.

¹⁶Sec. 7837.

⁸Sec. 15792.

¹⁷Sec. 9918.

⁹Sec. 10425.

¹⁸Chap. 319, sec. 37.

¹⁰Chap. 38, sec. 517.

¹⁹Sec. 7032.

the court, and which were made by the consent, express or implied, of the ward, and for his benefit or the benefit of his estate." Several other states, although they do not copy this section word for word, make substantially the same provisions. These states are Arkansas,¹ Missouri,² Tennessee,³ and Virginia.⁴ Iowa⁵ and Kansas⁶ provide for "such compensation as the court may from time to time allow, the amount and service for which it was given being entered on the court record." Similar provisions are found in Kentucky⁷ and Rhode Island,⁹ which specify as part of the expenses, in one case repairs and in the other suitable support. New Hampshire⁹ adds to the provision on reasonable compensation for expenses and services, that "the balance of account due him shall be a lien upon all the estate of the ward, not disposed of, for the recovery of which, after he ceases to be guardian, he may maintain an action for money paid and advanced." Maryland,¹⁰ while making no general provision for compensation in the chapter on Guardian and Ward, provides that if a mother is left natural guardian, the court shall allow her in her settlement of accounts all such charges, expenses and commissions allowed other guardians. Compensation is a part of the conditions of the bond in Maine¹¹ but is not provided otherwise. North Carolina¹² and South Carolina¹³ prescribe that guardians receive the same compensation as administrators and executors and provide elsewhere in detail for this compensation. Vermont¹⁴ makes "an allowance to guardians before making a dividend of a reasonable sum for managing the estate, maintaining the ward, wearing apparel, etc."

The allowance for maintenance and education should be dealt with in the statutes in connection with allowances and the settlements made annually or periodically. Compensation, if allowed, should be allowed at the time of these accountings and recorded. Whether the compensation should be left to the discretion of the court is questionable when the court has no competent administrative assistance for ascertaining the "trouble in managing" the estate, or for verifying the income and expenditures.

¹Sec. 4229.

²Sec. 436.

³Sec. 8522.

⁴Sec. 5425.

⁵Sec. 12599.

⁶Chap. 38, sec. 227.

⁷Sec. 2036.

⁸Sec. 5679.

⁹Chap. 289, sec. 6.

¹⁰Chap. 93, sec. 186.

¹¹Chap. 80, sec. 12.

¹²Sec. 2190.

¹³Sec. 5552.

¹⁴Sec. 3691.

A greater degree of justice could be attained by leaving the matter of compensation discretionary. The Uniform Veteran's Guardianship Act considered it wiser at the present time to specify the amount of compensation and did not leave it to the discretion of the courts.

The other states which provide for compensation of guardians provide specifically in percentages or amounts. Considerable variation is found in the maximum compensation allowed guardians for their services. A few states distinguish between regular allowances and those made at final settlements. Alabama¹ provides that guardians be allowed 2 1/2 per cent on disbursements, just compensation for special services, and reasonable premiums on bonds and at the final settlement, 2 1/2 per cent on the value of personal property or choses in action surrendered to the ward up to \$20,000 and 1 per cent on the excess over \$20,000. Colorado² prescribes that guardians be paid not more than 3 per cent on money arising from the sale, mortgage or leasing of real estate and not more than 6 per cent on the personal estate where it does not exceed \$25,000, 4 per cent on the personal estate over \$25,000 and under \$100,000 and 3 per cent on the personal estate over \$100,000. Tutors in Louisiana³ may retain as a commission for their care and labor 10 per cent on the annual amount of revenue of the property committed to their care. The court in Mississippi⁴ examines and allows as much as proper but not more than 10 per cent of the value of the estate. Provisions such as those for allowances on the personal estate in Colorado and the estate in Mississippi could apply only at the time of final settlement, for such allowances periodically would soon consume the entire estate. New Jersey⁵ provides that "the allowance or commission to guardians shall be made with reference to their actual pains, trouble, and risk in settling such estate rather than in respect to the quantum of the estate" and shall not exceed: 7 per cent on \$1000, 4 per cent on that over \$1000 through \$5000, 3 per cent on that over \$5000 through \$10,000 and 2 per cent on all over \$10,000. This evidently refers to income, for there is a further provision that when the estate is more than \$50,000 at the final settlement the court shall not allow more than 5 per cent and that when the estate exceeds \$20,000, the court is to allow for actual pain and trouble not over 5 per cent of the estate and income. To say the least, such provisions are confusing. Oklahoma⁶ permits guardians

¹Sec. 8214.

⁴Sec. 1893.

²Sec. 5368.

⁵Sec. 128, p. 3859.

³Sec. 349.

⁶Sec. 1463 a, b, and c.

to receive no greater amount for their services than the following: 10 per cent for collecting real estate rents, 10 per cent on real estate loans, 3 per cent for collecting oil and gas rentals and royalties, and 10 per cent of all other income collected and accounted for, provided the total compensation not be more than \$4000 a year. Oklahoma also limits the amount of attorney's fees and auditor's fees for guardians to not more than \$25.00 a day of eight hours. This last specification is probably due to guardians having submitted larger fees in their accounts. It is well known that many minors in this state have inherited rich oil lands in connection with which large fees might be asked. Nevertheless, it seems dangerous for the statutes to name such a large fee lest it tend to raise fees for all wards to this amount. South Carolina¹ allows guardians the same compensation as administrators which is "not more than \$2.50 for every \$100 received, \$2.50 for every \$100.00 paid out and \$10.00 on every \$100.00 arising from money let out at interest." Reasonable expenses and probably some compensation are allowed in the remaining states, but these states make no statutory provisions regarding compensation.

There is relatively little occasion for judicial decisions in connection with compensation of guardians. Compensation, whether justifiable or not, is allowed by the court, and the guardian is therefore protected from future attack unless it can be proved that his accounts were fraudulent. The order of a probate court allowing commissions is not conclusive in the sense that it is not reviewable in a direct proceeding.² The appellate or chancery court, however, will not disturb the allowance made, unless it is manifestly excessive.³ The matter of compensation is left to the consideration of the court in passing the account and has nothing at all to do with the account and therefore cannot be considered by the jury.⁴

A guardian, upon resignation, pays costs and receives no compensation,⁵ but he is entitled to full compensation when the ward chooses another guardian.⁶ Where a guardian has been

¹Sec. 5552.

²Walton v. Erwin, 1 Ired. Eq. 136 (1840).

³Green v. Barbee, 84 N.C. 69 (1881); Roach v. Jelks, 40 Miss. 754 (1866).

⁴Gott v. Culp, 45 Michigan, 265 (1881).

⁵Matter of Jones, 4 Sandf. Ch. (N.Y.), 615 (1847).

⁶Phillips v. Lockwood, 4 Dem. (N.Y.), 299 (1885).

unfaithful to his trust, whether by wilful act or indifference, he is not entitled to compensation.¹ In an Iowa case,² it was held that failure to file report and laxness in obtaining authority from the court, justified reducing the ordinarily reasonable fee of \$1000.00 allowed by the district court to \$250.00. The allowance of any compensation where there has been neglect seems too generous. In the absence of neglect or fraud, the courts appear to be liberal in their attitude toward compensation. It was held in Pennsylvania³ that a guardian is entitled to compensation for personal services rendered to the ward's estate, notwithstanding an agreement with the ward's father that he would collect and receive the estate, manage and invest it, and that the guardian should charge no commissions except on the trust fund which might pass into his hands in the event of the father's death. The loaning out of money by a guardian is not such "extra" service as entitles him to extra compensation,⁴ nor are commissions allowable on amounts which the guardian is ordered to disburse, but has not yet disbursed.⁵ Where the fund in the guardian's hands is small, the interest thereon may be allowed him in lieu of compensation.⁶

It has been held that compensation ought to be graduated to the responsibility incurred, the amount of the estate, and the labor expended, and that even awarding it in a gross sum is preferable to the adoption of a uniform rate in the shape of commissions.⁷ On small estates, compensation is undoubtedly burdensome. The Uniform Veteran's Guardianship Act provides for a uniform rate of 5 per cent with an additional 5 per cent allowance for special services. This five percentum is a high rate on the small pensions involved. This is particularly true when banks and trust companies are guardians of the estate, and incur no responsibility and perform no service other than to deliver the funds to guardians of the person. Compensation is allowed in relation to the estate only. It may be expected that the charges for room and board will include something for services rendered by guardians of the person when they are not also guardians of

¹In re Carlson's Guardianship, 297 Pac. 764 (Wash., 1932).

²Benson v. Benson, 239 N.W. 79 (1932).

³Williams' Appeal, 119 Pa. St. 87 (1888).

⁴Nielson v. Cook, 40 Ala. 498 (1868).

⁵Allen v. Martin, 38 Ala. 442 (1862).

⁶Mattox v. Patterson, 60 Iowa 434 (1883).

⁷In the Matter of Harland, 4 Rawle 323 (1835); Gott v. Culp, 45 Mich. 265 (1881); May v. May, 109 Mass. 252 (1872).

the estate. The presumption seems to be that the intimate relationship of personal guardianship is so akin to that of Parent and Child, that no reward would be expected. In connection with compensation as so often in other connections, the statutes ignore guardianship of the person.

If courts were equipped to give careful supervision to guardianships, compensation could be allowed more equitably to guardians and more economically to the wards. Many guardians are not careful to keep down fees which they do not have to pay themselves. Unless more careful supervision is given to the office of guardian, it is probably wise to name the compensation in the statutes.

CHAPTER VI

TERMINATION OF GUARDIANSHIP

Guardianship comes to an end when wards reach majority and in some states when they marry. Any particular guardianship may terminate by reason of the ward's choosing another guardian upon reaching fourteen years of age. Guardians may resign and they may be removed for any one of several reasons. Although a few states prescribe that guardians appointed by the court shall not be discharged until one year after the majority of the wards, active guardianship ceases when the wards attain full civil capacity. Testamentary guardianship ceases with majority or at any earlier time named by the testator.

Guardianship ceases upon the death of the guardian or the ward. Upon the death of a guardian, an infant has a right to compel a settlement of his accounts by his executor or administrator, as if he were of age; the guardian's trust being personal and terminating at death. The court may compel settlement upon the death of a guardian. The court, or the heirs of the ward, may compel the guardian to settle his accounts and hand over, to those who rightfully inherit, the estate upon the death of the ward. The guardian's authority ceases instantly upon the death of the ward.

Guardianship terminates upon the majority of the ward. The age of majority is twenty-one in most states. It is eighteen in a few states. The age of majority for males and females is twenty-one in Alabama, Arizona, California, Colorado, Connecticut, Delaware, Florida, Idaho, Indiana, Kansas, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New York, North Carolina, North Dakota, New Hampshire, New Jersey, New Mexico, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Texas, Utah, Virginia, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. The age for males is twenty-one and for females, eighteen in Arkansas,¹ Illinois,² Maryland,³ Mississippi,⁴ Nevada,⁵ South Carolina⁶ and the District of Columbia.⁷

¹Sec. 4154.

⁵Sec. 9500.

²Chap. 64, sec. 1.

⁶Sec. 8633.

³Chap. 93, sec. 199.

⁷Sec. 1139.

⁴Sec. 1893.

This offers no particular difficulty if the ward and her property are situated in the same state. If they are separated, the female ward upon reaching majority at eighteen can cause the revocation of the guardianship of her estate in a state where twenty-one is the age for majority; the law in the state of her domicile controls.¹

In many states, variations in the normal termination of guardianship result from marriage for both sexes. Guardianship of the person ceases with marriage. Guardianship of females ceases with marriage in Delaware,² Kentucky,³ Louisiana,⁴ Maine,⁵ Maryland,⁶ Minnesota,⁷ Nebraska,⁸ New Mexico,⁹ Oregon,¹⁰ Tennessee,¹¹ and Texas.¹² It ceases with the marriage of females, if the husband is twenty-one in Alabama,¹³ or when there is no estate in Missouri,¹⁴ or when the marriage had the guardian's consent in Washington.¹⁵ In Wisconsin¹⁶ guardianship of the person ceases upon marriage and upon petition that of the estate may also cease. The statutes do not distinguish the sexes or guardianship of the person or guardianship of property but simply provide that guardianship cease with majority or marriage in Florida,¹⁷ Mississippi,¹⁸ and North Carolina.¹⁹

Guardianship of the person but not of the property ends with the marriage of females in Massachusetts,²⁰ Michigan,²¹ New York,²² Ohio,²³ and Vermont.²⁴ This is true for both males

¹Matter of Rhoades, 184 App. Div. 658, 172 N. Y. S. 399 (1918).

²Sec. 3914.

³Sec. 2025.

⁴Louisiana Code of Civil Practice. Dart (1932), sec. 379.

⁵Chap. 80, sec. 23.

⁶Chap. 93, sec. 199.

⁷Sec. 8922.

⁸Chap. 38, sec. 101.

⁹Chap. 62, sec. 125.

¹⁰Chap. 11, sec. 1323.

¹¹Sec. 8470.

¹²Sec. 4104.

¹³Sec. 8207.

¹⁴Sec. 431.

¹⁵Sec. 9904.

¹⁶Chap. 319, sec. 10.

¹⁷Sec. 9933.

¹⁸Sec. 1893.

¹⁹Sec. 8880.

²⁰Chap. 201, sec. 5.

²¹Sec. 15788.

²²Chap. 14, sec. 84.

²³Sec. 10929.

²⁴Sec. 3718.

and females in Arizona,¹ Arkansas,² California,³ Connecticut,⁴ Idaho,⁵ Montana,⁶ Oklahoma,⁷ South Dakota,⁸ Utah,⁹ and Wyoming.¹⁰

Guardianship of the person by natural guardians, or parents, automatically ceases with the majority of their children. When parents are appointed guardians of property, the rules for terminations of guardianships generally apply, or at least the statutes make no distinctions.

At the age of fourteen, the age at which the old form of guardianship in socage ceases, minors without testamentary or chancery guardians are permitted to choose their own guardians with the approval of the court. The office of an appointive guardian may terminate by a ward choosing another guardian in those states which permit it. The previously appointed one makes a final settlement and is discharged and letters are issued to the new guardian. In twenty-one states,¹¹ minors may upon reaching the age of fourteen, select a new guardian who must be appointed by the court. These states are Arkansas, California, Connecticut, Delaware, Idaho, Illinois, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, South Dakota, Texas, Utah, Vermont, Wisconsin, and Wyoming. In Indiana, a guardian is not to be removed and another chosen when a ward reaches fourteen except for good cause shown. Minors having testamentary guardians have no freedom of choice except in Connecticut where they may nominate a new guardian of the person. The statutes of the other states are silent on the removal of one guardian and the selection of another by minors.

Guardianship may be terminated by the resignation of the guardian. Although no mention of resignation is found in the statutes on Guardian and Ward of Indiana, Iowa, Kansas, New York, South Carolina, or the District of Columbia, there is usually an

¹Sec. 4122.

²Arkansas, Acts of 1921. Art. 257.

³Probate Code of California (1931), sec. 1590.

⁴Sec. 4798.

⁵Sec. 7848.

⁶Sec. 10457.

⁷Sec. 6591.

⁸Sec. 3498.

⁹Sec. 7811.

¹⁰Sec. 7017.

¹¹See pp.43-5 for citations.

entire section devoted to this point in the statutes of the other states.¹ The law usually provides that a guardian may be allowed to resign upon petition when it appears proper to the court or judge. Ohio allows resignation for "reasons satisfactory to the court." In North Dakota a guardian may petition to resign at any time. When the estate is exhausted, he may resign in Florida. In Tennessee and Utah, the resignation of guardians is "similar to that of administrators and executors," which is upon petition to the court. Guardians are no doubt permitted to resign in the other states but the conditions may be more strict. For example, in New York, "the court will not discharge a guardian from his trust, on his petition, unless for good causes shown."²

A guardian cannot, however, resign to avoid removal because of abuse after complaint has been made and before settlement of his accounts or appointment³ of a new guardian. A Missouri decision declares that a court has no power to discharge a guardian of a minor until examination of his accounts has been made and notice given.⁴ In some states, however, orders may be issued permitting a guardian to resign before settlement and accounting has been made.⁵ The inadvisability of this is obvious.

Guardians may be removed for various causes. When a

¹Alabama, sec. 8225; Arizona, sec. 4146; Arkansas, sec. 4230; Probate Code of California (1931), sec. 1582; Colorado, sec. 5239; Connecticut, sec. 4962; Delaware, sec. 3919; Florida, sec. 5933; Idaho, sec. 7893; Illinois, chap. 64, sec. 39; Kentucky, sec. 2024; Maine, chap. 80, sec. 23; Maryland, Art. 93, sec. 193; Massachusetts, chap. 201, sec. 33; Michigan, sec. 15787; Minnesota, sec. 8789; Mississippi, sec. 1873; Missouri, sec. 436; Montana, sec. 10456; Nebraska, chap. 38, sec. 507; Nevada, sec. 9527; New Hampshire, chap. 289, sec. 30; New Jersey, p. 3868, sec. 146; North Carolina, sec. 2160; North Dakota, sec. 8703; Ohio, sec. 10938; Oklahoma, sec. 1491; Oregon, chap. 11, sec. 1322; Rhode Island, sec. 5670; South Dakota, sec. 3516; Tennessee, sec. 8540; Utah, sec. 7806; Virginia, sec. 5326; Vermont, sec. 3717; West Virginia, chap. 44, Art. 10, sec. 7; Wisconsin, chap. 319, sec. 08, Wyoming, sec. 7058.

²Ex parte Crumb, 2 Johns. Ch. 439 (1817).

³Bartee v. Tompkins, 36 Tenn. (4 Sneed), 623 (1857).

⁴Mead v. Makewell, 8 Mo. App. 549 (1880).

⁵King v. Hughes, 52 Ga. 600 (1874), states that granting an order permitting a guardian to resign is no judgment that a full settlement and accounting has been made.

guardian is removed, the court is usually directed by statute to appoint another in his place. Judicial procedure is necessary to remove guardians. They must have notice, which varies among the states from five to sixty days, and an opportunity for hearing to defend themselves,¹ and show cause why another should not be appointed. Certain causes for removal become evident to the court in the course of its supervision of the estate; other causes can not be known to the court unless brought to its attention by the petition of the minor or some interested person.² If after hearing and examination, the court does not see fit to remove the guardian, the one bringing the action is liable for costs. If the court does remove the guardian, it is supposed to order him to make a final settlement with the court or the succeeding guardian and if there are damages, he is held for them.

The statutes of the forty-eight states and the District of Columbia mention a goodly number of causes for removal but in substance, they amount to practically the same thing. Causes may be classified as those relating to duties to the ward, personal incapacity of the guardian, causes related to court supervision, and general causes. These classifications overlap as do the several causes given by a particular state. Some of the causes are so general that they cover practically everything which might arise. In all cases, it is left to the court's discretion, and this can be extended as far as occasion demands.

Abuse of the trust is mentioned as a cause in nine states.³ Continued failure or neglect to perform duties is given in fourteen states. Having interests adverse to the faithful discharge of his duty towards his ward is sufficient in five states.⁴ Failure to support and educate the ward according to his estate and position in life⁵ and failure to educate a ward to read and write⁶ are grounds for removal in a few states. A guardian's being

¹Isaacs v. Taylor, 3 Dana 600 (1835).

²Cotton v. Goodson, 1 How. (Miss.) 295 (1836), states that an application for removal cannot be made by a mere stranger. There should be an averment of interest, in the absence of which the petition should be dismissed.

³Arizona, California, New Jersey, North Dakota, Oklahoma, South Dakota, Tennessee, Virginia, and West Virginia.

⁴Arizona, California, North Dakota, Oklahoma, and South Dakota.

⁵Illinois, North Carolina, and Tennessee.

⁶Colorado.

about to or intending to marry his ward in disparagement is included in two states.¹ Sixteen states² name "waste or mismanaging the property of the ward."

Incapacity or evident unsuitability or unfitness,³ insanity,⁴ continued inebriety or habitual drunkenness,⁵ gross immorality,⁶ incompetence for managing his own affairs,⁷ conviction of a felony,⁸ being legally disqualified to act, such as becoming a judge or other officer ineligible to act as guardian,⁹ insolvency,¹⁰ in case there is property, insolvency of sureties,¹¹ conduct which would endanger his sureties,¹² fraudulent conduct,¹³ fraudulently granted letters¹⁴ are causes given by many states.

A guardian may be removed when one is no longer necessary,¹⁵

¹North Carolina and Tennessee.

²Alabama, California, Colorado, Connecticut, Minnesota, Missouri, Montana, Nebraska, Nevada, North Carolina, North Dakota, New Jersey, Ohio, Tennessee, and Wyoming.

³Idaho, Illinois, Kentucky, Massachusetts, Michigan, Minnesota, Montana, Nebraska, Nevada, North Dakota, New Jersey, Oklahoma, Oregon, Rhode Island (sickness), South Dakota, Vermont, Wisconsin, Wyoming, and Georgia.

⁴Colorado, Idaho, Illinois, Kentucky, Massachusetts, Michigan, Montana, Nebraska, Nevada, New Jersey, Oregon, Pennsylvania, Rhode Island, Vermont, Wisconsin, and Wyoming.

⁵Alabama, Indiana, Ohio, and Pennsylvania. (Kettletas v. Gardner, 1 Paige (N.Y.), 488 (1829).

⁶Arizona, California, North Dakota, Oklahoma, South Dakota, and Tennessee.

⁷Alabama, Arizona, Colorado, Connecticut, Indiana, Kentucky, Missouri, Ohio, and Pennsylvania.

⁸Alabama and Colorado.

⁹North Carolina and North Dakota.

¹⁰Arizona, California, Oklahoma, South Dakota, and Tennessee. It is doubtful whether insolvency is sufficient in Mississippi and North Carolina.

¹¹North Carolina and Tennessee.

¹²Colorado, District of Columbia, and Mississippi.

¹³Illinois, Indiana, and Ohio.

¹⁴Colorado.

¹⁵California, North Dakota, Oklahoma, and South Dakota.

or when the cause for which he was appointed no longer exists.¹ Failure to return inventory,² failure to render accounts,³ failure to give additional bond,⁴ and failure to comply with any court order⁵ are causes for removal as well as usually causes punishable as contempt of court. Removal from the state is a possible cause everywhere, but it is specified as a cause in the statutes of a large number of states.⁶ Some states add absconding to removal from the state as a cause. Removal from the county is sufficient in one state.⁷ One state provides that a temporary absence is not sufficient for the removal of tutors or curators.⁸

Any cause seeming "good and sufficient" to the court is listed in a number of states⁹ but it is reasonable to suppose that this cause is universally applicable. Other states vary in their description of this same cause naming: "for the welfare of the child,"¹⁰ for the good of the ward, the best interest of the ward,¹¹ whenever it appears necessary and expedient to the court.¹² This last cause covers all the rest.

The statutes cannot prescribe causes to meet every

¹New Hampshire.

²Alabama, California, Idaho, Illinois, Kentucky, Minnesota, Mississippi, New Jersey, Ohio, and Washington.

³Arizona (30 days), California, Idaho (30 days), Illinois, Iowa, Louisiana, Maine, Michigan, Mississippi, Missouri, Montana (30 days), New Hampshire (4 years), New Jersey, Oklahoma (30 days), South Carolina, South Dakota, Vermont, and Wisconsin.

⁴Delaware, Illinois, Kansas, Maryland, Mississippi, New Jersey, New Mexico, Ohio, Pennsylvania, Rhode Island, Tennessee, and Vermont.

⁵Alabama, Iowa, Minnesota, Missouri, Nevada, North Dakota, New Jersey, Vermont, and Wisconsin.

⁶Alabama, Arizona, California, Colorado, Illinois, Indiana, Kentucky, Minnesota, Missouri, Nevada, North Carolina, North Dakota, New Jersey, Oklahoma, Pennsylvania, Rhode Island, South Carolina (10 months), Vermont, and Wisconsin.

⁷Ohio.

⁸Louisiana.

⁹Alabama, Colorado, Delaware, Illinois, Iowa, Mississippi, New Mexico, Utah, and Washington.

¹⁰Indiana.

¹¹Ohio.

¹²Maine and New Hampshire.

contingency. The value, therefore of giving more than general directions to the court is questionable. The power to remove guardians is inherent in chancery courts, extending, in the absence of statutory provisions to the contrary, over all guardians, "whether appointed by themselves (chancery courts), by a court of probate, by testament, or even by express Act of legislature, whenever the guardian abuses his trust or the interest of the ward requires it."¹ The power to remove guardians is now vested in most states by statute in the same courts having power to appoint them. The power to remove guardians is not an arbitrary one, but is to be exercised only for sufficient cause which must be proved to exist. Sufficient cause, however, is liberally interpreted and mere unsuitableness, without misconduct of any kind, is sufficient.² Incapacity is interpreted as including mental and physical limitations as well as ignorance.³

Whether the states name few or many causes for removal, the deficiency in the laws is not to be found in a lack of causes for removal, but in the means by which the courts can detect the presence of factors justifying removal before extensive damage has already occurred. Children are not often aware of the manner in which their estates are being administered. They may not realize that they can complain, and they cannot be expected to interpret the conduct of their guardians as unsuitable to the trust. They may be afraid to complain of the abuses to their person. Strangers may not be aware of factors which justify removal nor would they care to assume liability for costs of a suit. More and more, particularly in urban communities, people are inclined to attend to their own business. Many people do not know their neighbors, much less the children intrusted to the custody of their neighbors. There is some opportunity at the time of the periodical settlements for the courts to determine maladministration of the estate due to dishonesty or ignorance. There is almost no opportunity for the court to learn of the guardian's suitability or lack of suitability for a personal trust. The courts give no

¹Woerner, American Law of Guardianship (1897), p. 113 quoting Catou, speaking for the Supreme Court of Illinois in Cowles v. Cowles, 8 Ill. 435 (1845).

²Woerner, op. cit., p. 113. Murphree v. Hanson, 197 Ala. 346; 72 So. 437 (1916). A court of equity may remove a guardian, although he be appointed by the probate court.

³Appeal of Nicholson, 20 Pa. St. (8 Harris), 50 (1852), states that ignorance of duty is within definition of misconduct.

supervision of guardianship of the person even though guardians of the person and estate are fully subject to the court's supervision. Probate courts are not provided with trained persons to assist in making investigations for the appointment of guardians or to give continuous supervision. It is reasonable to suppose that petitions for the removal of guardians are never brought except when some person wants the custody, when abuse is notorious, or when mismanagement of the estate is glaring. The authority of the court in representing the state as parens patriae has been extended very far.¹ Parents as well as guardians may be removed for no other cause than that their removal promotes the welfare of the child. No further extension of authority is necessary to guarantee suitable and proper guardianship. There is sufficient precedent to the effect that the appointment, supervision, and removal of guardians are within the discretion of the court. The present needs are the creation and development of court facilities to aid in the active exercise of this discretion. So long as the courts wait upon tardy information and petitions for removal of guardians, they cannot pretend to be accomplishing the full purpose of their jurisdiction over guardianship which is the welfare and best interests of wards.

¹In re Howard's Guardianship, 24 Pac (2d), 482 (1933), states that it is within the power of the appointing court to remove the guardianship of a minor from any antagonistic person or influence.

CHAPTER VII

CONCLUSION

The numerous differences in the law of guardianship from state to state cannot be justified as meeting special needs. Lack of uniformity does not mean that one state has a system of guardianship laws superior to another. The differences have arisen historically and are either developments produced by chance influences or special changes brought about by the promotion of particular interests, for example, the enlargement of the mother's rights. On the whole, guardianship laws have not been changed since their first enactment. The laws of every state are inadequate to meet the needs of present-day conditions, and social conditions have become relatively uniform throughout the country.

The better points in the laws of the forty-eight states should be brought together and incorporated with necessary additions in uniform legislation. Uniform legislation, insofar as legislation can, should meet the inadequacies. A uniform law would be better than the existing laws. It would be carefully thought out, and the gaps in the present statutes would be filled. Simplicity and convenience would be served. Lack of uniformity makes the law of guardianship difficult to understand. It complicates the transfer of guardianship from one jurisdiction to another. It doubles the problem for wards having residence in one state and property in another. It makes record-keeping and statistics incomparable. A step has already been taken toward uniformity in the Uniform Veteran's Guardianship Act, which contains practically all the material in the confused chapters of statutory law on Guardian and Ward, with additional administrative provisions. This Act has been adopted by nearly all the states. It is simple and convenient and shows that uniform action can be achieved. The statutes on Guardian and Ward should be a challenge to the Committee on Uniform Legislation.

What should a uniform guardianship law contain? Apart from administrative improvements to which attention will be given later, consider what provisions there should be in a guardianship of minors act. The court having jurisdiction should be clearly indicated. There is no necessity for changes in the courts having jurisdiction, or in their various titles. What is important is that all courts having jurisdiction over guardianship be required to equip themselves with social and administrative facilities for

fulfilling their special function. These courts must be recognized as courts having special problems and tasks. They are specialized and continuous in the performance of their guardianship functions. Confusion arising from concurrent jurisdiction should be eliminated by definite inclusion in the statutes of the courts which have jurisdiction and the extent of their jurisdiction. It is not important that several courts should have jurisdiction over guardians and wards, but it is important that the services of one court should be available to every ward. Jurisdictional prerequisites should be made clear. Because of the difficulty which can arise in establishing a minor's domicile, it is suggested that residence of the minor and his need for a guardian be sufficient to give the designated court jurisdiction to appoint a guardian of the person. Property situated within the county should be sufficient for the appointment of a guardian of the estate. The court in which appeal lies should also be named.

A uniform law should provide various kinds of guardians,-- natural guardians, testamentary guardians, and court-appointed guardians, including those for minors over fourteen who elect their own guardians, and guardians ad litem. Equal guardianship rights should be given to father and mother. Equal powers of testamentary appointment or the restriction of this power to the surviving parent should be included. The choice of guardians by minors over fourteen should be subject to the full discretion of the court, rather than to the limited approval which now exists in some states. The misnomer "socage guardianship" offers no advantages and should be eliminated. The special civil law requirements for the family meeting and any special terminology in Louisiana could be preserved without offering any difficulty in the adoption of uniform legislation. Guardianship ad litem should, of course, be continued, but as supplementary to general guardianship and not as a substitute for it.

Guardianship procedure should be prompt and comprehensive. Provisions should be made in the statutes for temporary arrangements pending definite appointment of permanent guardians. Requirements for notice, citation, and hearing should not be difficult to reduce to uniformity. Testamentary guardians should be required to qualify and meet the approval of the court immediately upon the death of the surviving parent. Periods of three or six months after the will is probated and before the nominee must qualify should not be tolerated. Testamentary guardians should be subject to the same requirements and liabilities as other guardians. Some means whereby the court is informed of the loss of the surviving parent or guardian should be incorporated into the law with the requirement that the court cite the minor (if fourteen),

the one having custody, and other interested persons to appear and initiate immediate arrangements for the appointment of a guardian, whether or not there is property. In this way, all minors could be provided with guardians, and the court, representing the state, need not wait upon a petition.

Uniform legislation should require bond of all guardians of the estate before letters of guardianship are issued. The amount of the bond should be based on an inventory of the estate. If the guardian is appointed after the estate has come to the child, which would be after the estate is settled, an inventory has already been made and the amount of the bond can be fixed accordingly. If the estate has not been settled, the guardian's temporary bond need cover only the allowance for the support of the ward, which is granted pending the settlement of the estate. Provision for the requirement of additional bond at any time covers the need which arises through changing values in the estate. The proportion of the bond to the estate should be uniform throughout the United States, and this uniformity should not be difficult to attain, since the amounts now required do not vary so widely as the terminology of the statutes. Bonds of guardians of the person and the estate are conditioned upon proper care and education of the person as well as proper administration of the estate. When guardianship of the person is separated from that of the estate and vested in another person, he should also be bonded unless the court is equipped to give guardianship of the person more constant supervision than is now available. The fact that, in recent years, bonding companies are being used to some extent instead of personal sureties should be considered as removing the oversight which sureties give the administration of the estate for their own protection. When guardianship is transferred from one jurisdiction to another, a transcript of records should be sent to the new court in order to avoid any interruption in the supervision.

The limitations on the statutory provisions for guardianship of the person render it relatively simple to make them uniform. Law cannot make detailed provisions for guardianship of the person. This aspect of guardianship must be left to the discretion and regulation of the court. Circumstances vary with each individual case. The statutes can give only general directions for the guidance of the court and guardians. While the law cannot attempt to cover all the situations which might arise in connection with guardianship of the person, it should provide for and require fuller investigation of the assignment in the first instance and continuing supervision throughout the existence of the relationship. The legislature can not prescribe the

allowances for maintenance and education, but can only direct that they be in accord with the financial condition of the ward, his social position, and his future expectations. The court must decide in individual cases what the allowance should be. The allowance for regular items, such as room, board, clothing, and tuition, should be determined in advance. All unforeseen expenses should be allowed at the next periodical accounting, provided they are reasonable and are accompanied by vouchers. The duties of the guardian of the person are similar to those of parents except as regards duty to support and right to services, and could be so described in the uniform act.

Provisions for the guardianship of the estate, which lend themselves more readily to uniform statutory direction than those affecting the guardian of the person, should be specific and positive. The greater part of the law on Guardian and Ward relates to the management of the estate. The variations among the states on this aspect of guardianship are particularly numerous and usually unimportant. Regardless of the directions, the actual supervision must be performed by the court in each individual case. Specific directions should be given in the statutes for the transfer of the estate to the guardian, the proper investment of funds, the length of time allowed for making investments before the guardian becomes chargeable with interest, the rate of interest chargeable, and the conditions for leases. The statute should prescribe the necessary proceedings for the mortgage and sale of real estate. Whether property in any particular case should be mortgaged or sold must be left to the discretion of the court, provided the reasons fall into the general ones listed in the statutes. A few states require the appointment of a guardian ad litem to represent the interests of the ward in these proceedings. Unless courts are provided with administrative personnell for the purpose of investigating and advising upon the mortgage and sale of real estate, and unless the state is thus represented in the infant's behalf, the requirement for guardians ad litem on these occasions should be mandatory and incorporated in uniform legislation. The present safeguards of notice, citation, hearing, and public sale, unless the court permits private sale, should be continued.

Uniform guardianship legislation should require annual accountings, as are now required in the majority of the states. The opportunity of the court to supervise guardians of the estate comes at the times of these periodical accountings. In some states these are required only every three years. This is too infrequent. Although the accounts are approved by the court, there is no final adjudication, and they are again subject to

review at the final accounting. This should continue to be the case. Accountings should not consist in filing reports in the clerk of court's office. Provision should be made for the examination of these accounts. The annual accounting offers a convenient time for the determination of allowances for support and education, for the examination of investments and the ordering of any advantageous changes, for the examination of the bond and sureties as to sufficiency and solvency, for the approving of anticipated leases and of anticipated sales or mortgage petitions. The court should be provided with an administrative staff qualified to examine the accounts competently and fully. The statutes should contain positive and comprehensive directions for the accountings, their examination, approval, and further steps concerning them.

Statutes should fix the time when final settlement must be made. The present statutory provisions are varied and unpar-donably vague. They should require specific court proceedings. Guardians should not be permitted to settle with the minor and accept his receipt without judicial review and discharge. Full and carefully examined final settlements would avoid much litigation thereafter. A few states require the appointment of guardians ad litem, notification of persons interested in the estate, and public announcement in the newspapers of the date of final settlement, with specific proceedings for examination before the discharge of the guardian and the release of his sureties. Until a better arrangement is found, these requirements should be included in a uniform guardianship law.

Compensation of the guardian should be named in the law. There is no reason why the compensation allowed guardians should not be the same from state to state. At present, various maximum percentages or amounts are named in the statutes of some states, and usually in a most confused manner. It is difficult to learn what compensation is allowed or when it is allowed. In some states, a percentage is allowed on what is spent, on what is paid in, and on the total of the personal or real estate. Some states allow compensation, but leave the amount to the discretion of the court. It seems wise to fix in the statutes the maximum allowance for compensation. Uniform compensation has been adopted for guardians of beneficiaries of the Veterans' Guardianship Act. The law should direct the courts to examine attorney's fees carefully and it should not fix maximum allowances per diem or otherwise for such services. When a maximum allowance for such fees is fixed in the statutes, it is likely to become the regularly excepted amount.

Termination of guardianship occurs in several ways.

Majority of the ward is one of them. Although majority for girls is not the same in all the states, uniform legislation need not disturb this fact, despite the difficulties which ensue. Majority can be interpreted according to the laws of each state. Guardianship of the person ceases with marriage. The effect of the marriage of the ward on the guardianship of the estate varies. Guardianship of the estate should be continued until majority regardless of marriage for both males and females. It continues now in most states for males. Separate property laws for married women make necessary the continuance of the guardianship of the estate for female wards. It should be continued until a female ward can competently and legally manage the estate herself.

A guardianship may terminate when the ward reaches fourteen years of age and chooses another guardian. Except for cause, minors should not be able to change guardians. Supervision of a disinterested sort is necessary. Sometimes when minors have changed guardians, they were not satisfied and wished to do so again. The court looks with disfavor upon frequent changes to meet childish whims. Many states now provide that the judge must appoint the new guardian chosen by the ward, unless unsuitable. Although the court may not be able to prove unsuitability, the change may not be for the best interest of the child. A child of fourteen is not necessarily the wisest judge of what he most needs. If minors continue to be permitted to change guardians at fourteen, full discretion should be given to the court. Wards with testamentary guardians cannot change the relationship, and children cannot exchange their natural guardians for others. The more permanent a satisfactory relationship can be, the better for all concerned. If the court gave constant supervision of guardians, it would be informed when a change would serve the best interest of the child.

The present provisions for resignation are, on the whole, vague. Resignation is allowed, and it seems reasonable that it should be. Some obligation, however, should be placed on the guardian when he accepts the trust to assume the office permanently. It is an office which should not be accepted lightly with the knowledge that it can be given up easily upon inclination. Nevertheless, a guardian who no longer wants to continue with the care of the child or the management of the estate, would probably serve the child best by resigning. The matter of resignation offers no difficulty in making guardianship law uniform. The law should, however, add to the provisions for resignation, requirement for final settlement with the court directly and the appointment of a new guardian to take office upon his discharge.

In the last analysis, removal from guardianship must be

left with the discretion of the court. Various causes for removal are listed in the statutes of the several states. In substance, they amount to the same thing. Some states leave it entirely to the discretion of the court. Uniform legislation should include general directions for removal, such as gross personal misconduct, abuse of the personal trust, mismanagement of the estate, and any other conditions which would make removal serve the best interests of the ward.

Positive directions should be given in the statutes for settling the extent of the guardian's responsibility for the estate in the event of the ward's death. They should also require the immediate attention of the court to the ward and his estate upon the death of the guardian.

A frequently uttered objection to uniform legislation is that the improvement of laws in more progressive states is sacrificed. Generally speaking, this may be a justifiable objection. In the matter of guardianship, however, legislation is only a means of control designed to supply the underlying principles to guide the courts. The principles are well understood and, on the whole, are incorporated in the present laws. A simple and brief uniform guardianship law would bring into relief the fundamental policy of the state towards its wards. It would permit and could encourage the creation of better provisions for the supervision and regulation of the social and business aspects of the trust. The legal machinery for carrying out these provisions will necessarily vary from state to state and can be enlarged and altered according to the resources and social vision of the individual states.

A uniform law meeting the particular inadequacies in the present provisions for guardians and wards would not cover the entire field of guardianship of children nor fully meet the needs of children in this relationship. Other laws must be considered and some adjustment between them and the law on Guardian and Ward must be accomplished. Machinery must be provided for actively carrying out the purposes of the law. In the past, the probate law on Guardian and Ward, the apprenticeship law, and the poor laws may have covered the field of guardianship fairly adequately. The apprenticeship laws are now relatively unimportant. The old poor laws are no longer considered satisfactory, particularly for children. At the present time, other courts besides those having probate jurisdiction determine matters of guardianship. The guardianship of a child may come before the divorce, the juvenile, and the probate courts. They are not mutually exclusive, and the variety of jurisdictions is highly confusing. It is not the purposes of this study to go into the law and administration of

divorce and juvenile courts. They have been treated elsewhere. Attention, however, must be given them in so far as they touch guardianship of minors, if the problem is to be considered as a whole and plans for comprehensive guardianship provisions are to be suggested.

Before going into the guardianship functions of these other jurisdictions, another confusion must be reckoned with. This is, the meaning of guardianship of the person in these other jurisdictions. Does the term signify the same thing and has it the same legal connotations in the several jurisdictions? This is a difficult point to clarify. In divorce and juvenile court terminology, the terms "guardianship" and "custody" are confused and sometimes used interchangeably. In a divorce or separation proceeding, the assignment of guardianship to one parent does not eliminate entirely the guardianship rights of the other parent. Some sort of residual guardianship continues in the other parent. The assignment of custody to one parent carries with it all the powers of guardianship, such as the determination of domicile, right to recover the child on writ of habeas corpus, etc. Upon the death of the parent having custody, however, the guardianship powers of the other parent reappear, his domicile becomes the child's domicile, and he may sue on writ of habeas corpus for the custody of the child, wherever placed by the other parent. Upon this writ, his natural right as parent is not the issue, but the welfare of the child. His guardianship stands, however, until he is removed and another guardian is appointed. The assignment of guardianship or custody to one parent by a divorce court may be said to suspend rather than remove the guardianship of the other parent.

The juvenile court is relatively new and all matters pertaining to its scope and authority have not yet come to the higher courts for determination. One point which remains undetermined in many states is its position as guardian. If a child becomes a ward of the juvenile court does the juvenile court guardianship suspend or remove the guardianship of the parents? If the juvenile court places the custody or "guardianship" of a child with an institution, agency, or boarding home or continues it in the child's own parents with probationary supervision, does the guardianship of the juvenile court continue? Is it transferred to the institution, agency, or boarding home? Does it remain, even though disturbed, with the parent? Without notice to the juvenile court, parents have sued on writ of habeas corpus and obtained the custody of a child from an institution where the juvenile court had placed it. If the guardianship had been recognized as continuing in the juvenile court, instead of in the parents, the writ could not have been issued and if it had, notice

would have; by legal requirement, been given to the juvenile court as guardian. Some solution for this confusion is necessary.

Attention is now turned again to the matter of confused jurisdictions. Distinction between them is clear in some respects. The question of guardianship arises in a divorce court in connection with the divorce or separation of parents. The divorce court is limited in its assignment of guardianship to one of the parties in the divorce action. When it is assigned to the mother or father, instead of being divided between them, it remains so assigned until the death of the parent having guardianship, unless petition for a change is made and granted by the divorce court. The question of custody arises in the juvenile court in connection with the alleged dependency, neglect, or delinquency of children. It arises in the probate court in connection with the inheritance of property by will or intestacy. Thus far, the distinction is clear. Whether property is present or not, probate courts grant letters of guardianship upon petition if it is deemed necessary and convenient, when there is no natural or legally appointed guardian, or when conflict arises over guardianship between parents and strangers or guardians and strangers. Although the cases are distinguishable from one another, the suitability of a parent as guardian of his children may be questioned and determined at the same time in all three courts with possibly conflicting results. Is this arrangement entirely satisfactory? If not, what is the solution?

Is the divorce court equipped with investigational and supervisional facilities to assign properly the custody of children? If it were, should it be limited to the assignment of one or the other of the parents? Is the judge in Reno or Mexico (where divorces can be obtained by mail) or elsewhere, competent to dispose of custody for the welfare of the child? Usually only one party to the marital contract petitions for divorce and the other party never appears. The hideousness of the present divorce laws produces all manner of subterfuge; both parties cannot appear to want the divorce and mutual agreement nullifies proceedings for divorce. Unless the other party wishes to contest the divorce, he never appears. When deliberate mutual consent is not back of the petition, the angered and irritable condition which usually exists in connection with the proceedings reduces both parties to a state of mind where they are not able to judge what is best for their children. The question of whether desire for divorce should be sufficient grounds will not be gone into here. Some liberalization of divorce laws can be hoped for in the future. Divorce might be advantageously turned over to an administrative office, with appeal to the court when contested. In whatever way

the matter of obtaining a divorce is provided for, the limitations on the divorce judge prohibits the proper assignment of custody or guardianship in many instances. The probate judge of Cook County has been known to postpone decision when both parents appeared wholly unsuited, notify the juvenile court, and await the latter's disposition of the custody before granting the decree. The custody of children should be referred to a judicial or administrative agency whose particular concern is the placing and supervising of children. Certainly the disposition of the custody of children ought to be determined by persons best prepared to perform this work. It is recommended therefore, that the determination of guardianship rights of divorced or separated parents be separated from the divorce action and made subject to the jurisdiction of another tribunal staffed with persons trained in children's case work, and free to assign the guardianship to other persons than the parents if both are deemed unsuitable and the welfare of the child demands it.

The juvenile court is not a tribunal which settles conflicts between two parties but in its actions is itself a party, representing the state, as parens patriae, functioning for the welfare of children and the protection of the community. Minors brought to the juvenile court become wards of the court, subject to its supervision. The supervision of this court continues after the immediate disposition of the case until the child reaches majority or is dismissed as needing no further supervision. Although in a sense the child is a ward of the court, his custody or guardianship may be left with the parents or guardians or it may be placed elsewhere. The juvenile court is the agency through which the state assumed most directly its function of supreme guardian. It does not await a petition for the guardianship of a child, but acts upon information indicating that the child is in need of supervision or is without proper guardianship. The juvenile court is in a sense a remedial agency. It is also an agency for prevention. In general, the children coming before this court are poor children. Those coming because of dependency and neglect are almost certain to be poor. "Delinquent" children are usually poor also because the well-to-do are able to care for their problem children in other ways. The court or some public agency must assume some financial responsibility for children who are removed from their own homes. All juvenile court cases present social problems, and a good juvenile court must be staffed with trained social workers to treat these problems. Juvenile court social workers must be skilled in investigating and determining improper guardianship and in securing proper guardianship.

Petitions for guardianship are brought to the probate

court when a child has property and a guardian of the estate is necessary, when testamentary guardians must qualify, and when conflict arises about the custody of the person. If a child inherits property and either or both parents are living, guardianship of the person is assumed to be suitable and guardianship of the estate is the only issue. Fathers are usually preferred as guardians of the estate. When a child is without any natural guardian, and property comes to him, a guardian of the person and the estate is needed. A general guardian may be appointed to fill both offices or they may be separated. Guardianship of the person alone seldom comes to the probate court and consequently, many children without property are never provided with legally constituted guardians. Guardianship of the person will not likely be petitioned for unless more than one person wants it. This is not likely to happen when there is no estate. When parents or one of them have left a child in the custody of another person long enough for that person to become attached to the child and then wishes to regain custody, this third person may petition the court for letters of guardianship. When parents are dead or desertion has occurred, or when more than one relative or friend wants the child, the probate court may be petitioned to appoint a guardian of the person. Probate court machinery is expensive to set into operation, and the cost deters the very poor from seeking guardianship of the person when there is no estate. In many states, proceedings for the determination of proper custody of a child may also be brought in any court having chancery jurisdiction. This is also expensive.

The probate courts are primarily interested in trustees, executors, administrators, guardians, and conservators of estates. The juvenile court is primarily interested in securing proper guardianship of the person and has no jurisdiction over property. Consequently, their jurisdictions do not overlap so frequently as they might otherwise do. One distinction between them is in the fact that the juvenile court functions itself in a guardianship capacity, and the probate court assigns the ward to a guardian. For all this variety of jurisdictions, provisions for guardianship of minors are far from comprehensive. Present provisions meet only those children who find themselves at opposite ends of the economic scale, i.e., those who inherit property and those who need actual protection from physical or moral danger--danger sufficient to bring them to the attention of the court. The judges or clerks of courts are charged with the duty to appoint guardians for children according to the criteria of the child's own welfare. Except in juvenile courts equipped with skilled probation officers, the law provides no way whereby the judge can know what will serve

the best interests of the child. Unless the parents have named guardians in their wills, the judge has no information to guide him in making appointments. Unless the property is such that must be probated, it may be lost forever to the child who has no record of what belongs to him and no way by which to induce some adult to assert claims in his behalf. The growing tendency to leave estates in trust with banks and trust companies may result in guardianship of the person being overlooked. For children at the bottom of the economic scale, supervision of the person is provided by the courts only after proceedings for dependency, neglect, or delinquency have been filed. Neither parents nor other guardians file such petitions against themselves. Persons outside the family group hesitate a long time before interfering in the private affairs of their neighbors, nor do they always know when conditions are such that complaint should be made. Some plan should be devised and adopted whereby all children without natural parents should be provided with legally constituted guardians, regardless of economic status. Such a plan should also include ways and means of making this comprehensive jurisdiction effective. It should also simplify the matter of confused jurisdictions. The realization of the inadequacies of the present statutory provisions and administrative procedures is of little avail unless thought proceeds to the discovery of better ways of making this phase of state responsibility more elastic, active and comprehensive. This this purpose several possibilities and their variations will be suggested in this study. None of them is entirely new. Each is in operation in some other phase of our legal activity.

It has been suggested that juvenile court jurisdiction be extended to include all matters relating to guardianship of the person and that guardianship of the estate be continued with the probate court.¹ This suggestion, if adopted, might operate to improve the administration and supervision of guardianship of the person and at the same time avoid the overlapping of jurisdictions for this office. In "The Child, the Family, and the Court," the following statement is made:

"Proceedings for the appointment of children's personal guardians and for their removal on the ground of unfitness can best be determined by the juvenile court with its facilities for investigation, although jurisdiction in these cases is usually given to the equity courts.

¹Flexner, Oppenheimer, and Lenroot, "The Child, the Family, and the Court," U. S. Children's Bureau, Pub. No. 193, p. 60.

"Guardianship of property involves no considerations that could make the new technique (social service) applicable. Property rights of children have always been protected by the common law, supplemented by equity, and there is no reason to disturb this situation. The new courts have enough to do, and generally more than enough, in trying to adjust the more intangible problems of personality."

Placing jurisdiction over guardianship of the person in the juvenile court alone offers both advantages and difficulties. The juvenile court has from its inception been based on principles of child welfare, has in itself a guardianship capacity and the consequent responsibility, and is already, in many places, equipped with trained social workers. It would be difficult for the probate court to adopt social service principles and methods. The probate court has been traditionally interested in property, not in child welfare. These are notable advantages in favor of juvenile court exercising jurisdiction over the appointment, supervision, and removal of guardians of the person. On the other hand, disadvantages present themselves. One lies in the fact that when a child has property, the same person is frequently appointed guardian of both person and property, and if the jurisdictions were separated, the guardian would be subject to both. Parents make testamentary appointments, and testamentary business is clearly the function of probate courts. Social workers should be able to advise intelligently about allowances for support and education. If the guardianship of the estate were under a separate jurisdiction, the social worker would have to work in conjunction with both courts to be effective. Unless the procedure of the probate court became more socialized, the worker's recommendations might not be welcomed or understood. Separate letters of guardianship for the person and the property would have to be issued to the guardian. Complications would arise if the juvenile court decided the guardian unfit and the probate court did not. For children without property, the guardianship of the person might well be placed under the jurisdiction of the juvenile court. For children with property and with parents living, this difficulty would not arise.

Another way, and perhaps the most obvious way, by which the administration of guardianship of minors could be infinitely improved, is by adding supplementary services to the probate court. Probate courts, which have had guardianship jurisdiction since colonial days, can be developed administratively to meet creditably the state's obligations toward minors. These supplementary services should be of two kinds: first, social service performed by trained children's case workers; second, property

service, performed by salaried, never free, lawyers and auditors. The several ways by which these services could be provided will receive attention shortly.

The social service department of the probate court would, upon notice of the need for a guardian or upon application for guardianship, see that satisfactory arrangements were made pending the appointment of a permanent guardian. The case worker would proceed to make a thorough investigation of the social situation and make recommendations for the appointment of the guardian of the person. The worker would have to be guided, of course, in her choice by guardians available. If no suitable person could be found to assume the responsibility, some arrangement for the child must be made. Where no guardian could be found because of inadequate income, the case could be referred to the juvenile court for placement, if it were deemed inadvisable for the probate court to develop a child placing service. After a satisfactory appointment, many cases would require relatively little supervision. The social worker could assure the court that the personal care of the ward is satisfactory and whenever occasion arose, make recommendations concerning the removal of guardians. In this way, the court would not have to wait upon conditions getting into such a serious state that strangers would feel called upon to petition removal. They would long hesitate to complain in view of the possible expense as well as disagreeableness. Nor would they know the time when the home was no longer a suitable one. The social worker could work in conjunction with the property department, and the judge would have the benefit of their joint recommendation in determining proper appointments, proper allowances for support and education, etc.

The workers in the property department could assist in the inventory of the estate, serving as official appraisers. They could be responsible for the examination and audit of the guardian's annual accountings, which should be submitted to them in time for their investigation to precede the court's passing on the accounts. In this way the court could keep fully informed of the condition of the estate and give intelligent directions for its administration. Property workers would be of special service when the guardian wished to encroach upon the body of the estate for maintenance and education. The actual awareness of the court of the management of the estate would prevent many errors and much fraud and would make it possible for them to be corrected in time. The property department should keep the court informed about the sufficiency of bond and sureties.

These services would eliminate much of the present necessity for attorneys, appraisers, suits, etc., which are frequently

unduly burdensome. Wards are not properly protected many times because their estates will not afford necessary legal aid. Because of the inability to obtain this protection, the Legal Aid Bureau of the United Charities in Chicago has been sought to handle guardianship matters in some cases. The services of this Bureau have proven satisfactory. In these cases, the Director has acted as guardian without fee and the social work necessary for the ward has been done by United Charities workers. In these cases the court has almost always waived costs. The Court Service Division of the Cook County Bureau of Public Welfare has rendered similar services to clients of that agency. These organizations are not known to many guardians and wards. Such legal and social aid is not available except in a few places. The fact that they have been called upon indicates that a need for such services exists and that they would be used elsewhere if they could be had. In effect, the creation of social service and property departments in connection with probate courts would transfer these services to the probate court as a normal part of that court's business and guardians and wards would not have to depend upon the chance of finding it elsewhere. If these services were added to the court, no minor need be without a guardian because of the cost attached to the procedure. These services would supplement those of the guardian, giving him protection in the performance of his duty and at the same time making it possible for the court to fulfill its purpose of protecting infant wards. With this supplementary help, suitable persons need not be so hesitant about accepting the responsibilities of guardianship, and at the same time, improper persons would be deterred from seeking it. Such services could be substituted for the office of public guardian in those states which have this office.

Adding these services to the probate court may seem objectionable to some because of the expense which would be placed on the court and the taxpayer. This objection can be answered in two ways. One answer is that since the duty of the state through the courts for the protection of wards and their estates is well established, the state cannot afford to do less than the best that can be done. The other answer is less arbitrary and is one based on experience, limited as that experience has been. That answer is that these services would not be extravagant but economical both in human and monetary values. The experience which is referred to here is that of the Guardianship Subdivision of the United States Veterans' Bureau.¹ There is no report nor have any

¹Kouschuetcky, op. cit., pp. 75-82.

studies been made of the probate court's administration of guardianship business. There is no way to ascertain the number of minor wards or the extent of there estates without special investigation and this has not been made. The Guardianship Subdivision of the United States Veterans' Bureau with its limited staff of regional directors and one hundred and fifteen social workers in 1932 and with its limited authority was able to report astounding savings and recoveries for the beneficiaries of the Veteran's Administration. In the United States during 1932, the amount saved in legal services, based on prevailing fees, was \$734,125. Many other costs were also saved. During that same year, \$343,586 was recovered from embezzled and misappropriated funds. The amount of embezzled and misappropriated funds discovered during that year was more than twice that which was recovered. It was estimated by the Veterans' Administration, on conservative reports, that the value of the services rendered by the Guardianship Service exceeds \$2,000,000 annually, plus the amount saved by the supervisory program. It is impossible to estimate the amount saved in human and social values through the assistance given by this service in obtaining suitable guardians and by reporting unsatisfactory conditions to the courts. This service is entirely supplementary to the authority of the courts which are under no obligation to respect or act upon the recommendations. These shocking figures when contrated with the cost of the service offer indisputable evidence of the need and the economy of such services. There is no reason to suppose that less could be saved or recovered for other wards whose guardians are appointed and supervised by the same courts. If anything, greater abuses probably exist where guardians are appointed without the recommendations based on actual investigations and where they run no risk of having the payments withheld until their periodical reports are filed with the Veteran's Administration. This last answer to the costliness of social and property services in the probate courts should satisfy the most conservative citizen.

Guardianship services could be built up in departments attached to each local probate court as the social services are nor attached to the juvenile courts. Social service is becoming a part of the services of other courts. The Social Service Department of the Municipal Court of Chicago and elsewhere is being enlarged and strengthened because of its proven worth. Another way by which such social service could be provided for the probate court is through the Department of Public Welfare. This would be possible anywhere, but it would be particularly expedient in those counties which would not have sufficient probate guardianship business to justify the full time of a social case worker. This

arrangement is not untried in other connections. It has been used successfully in Minnesota in connection with adoptions. The Board of Control is the public welfare authority in that state. The law there provides:

"Upon the filing of a petition for the adoption of a minor child, the court shall notify the Board of Control. It shall then be the duty of the Board of Control to verify the allegations of the petition, to investigate the condition and antecedents of the child for the purpose of ascertaining whether he is a proper subject for adoption, and to make appropriate inquiry to determine whether the proposed foster home is a suitable home for the child. The Board shall as soon as practicable submit to the court a full report in writing with a recommendation as to the granting of the petition and any other information regarding the child which the court shall require."¹

Guardianship of the person of infants, when not created by will or deed is akin to adoption.²

"The trend in adoption legislation is away from the purely legal point of view,--according to which adoption may be by notarial act (as in two states) or the court is expected merely to sanction a relationship as a justice of peace solemnizes a wedding,--toward the conception of adoption as essentially a process in social case work. Thus the newer laws provide for social investigation and for a trial period in the foster home before a decree is granted, the aim being to insure the welfare of the child and to avoid unnecessary severance of natural family ties."³

Should less caution be taken in the administration of the laws of Guardian and Ward? The guardian does not assume the legal responsibilities of the parent for support as does the adoptive parent, but he is given the authority to administer the child's own estate and he is not obligated to the child beyond its proceeds. There is probably less risk run in the sanction of an adoption petition than in the sanction of a guardianship petition

¹General Statutes of Minnesota, 1923, chap. 73, sec. 8625; for discussion see Nims, The Adoption Law in Illinois and Its Administration, 1926.

²Flexner, Oppenheimer, and Lenroot, "The Child, the Family, and the Court," U. S. Children's Bureau, Pub. No. 193, p. 60.

³Ibid.; see also Emelyn Foster Peck, "Adoption Laws in the United States," U. S. Children's Bureau, Pub. No. 148.

because the former is most likely to be prompted only by a desire for the child while the latter may be prompted by a desire to obtain benefits from the estate. Furthermore, in adoption cases someone must give the child in adoption,--the parent, the guardian, or some officer of a charitable institution,--while in guardianship cases, the parents are dead or incapable and no guardian has yet been appointed to represent the interests of the minor.

Due to the enormousness of such an undertaking as providing social case work and property services to all probate courts and due to the apathy or even hostility which would be met with in some quarters, it is recommended that single communities or cities undertake it and carry it on until such a time as others will demand it for themselves.

A more radical suggestion might be made for the administration of guardianship. The courts are overburdened. They are not entirely adaptable to the use of professional facilities. It has been found desirable to institute administrative law procedures for many fields, some of them new and some which have long been administered by the judiciary. The judiciary is primarily for the settlement of disputes, and some think it should be relieved of other duties and left free for the fulfillment of its purpose. Except where conflict arises, guardianship is purely an ex parte proceeding. An administrative law tribunal equipped to give specialized services would give more active supervision to guardians and wards than the court. It would not have to resort to formal court proceedings. The administration of the Workmen's compensation laws, minimum wage laws, etc. are examples in point. Anyone objecting to the findings or orders of the administrative tribunal could have recourse to the court. Some centuries ago, the law courts, bound by the rules of common law, came to be unable to mete out justice in all cases. "Courts of equity grew up against the substantive law of the time. Now that equity has become a part of the substantive law, a new court seems to be necessary."¹ Administrative law procedure offers a solution to many of the practical problems involved in the appointment, supervision, and control of guardians and in the protection of minors who are without natural guardians and for the protection of those having parents when conflict arises.

Regardless of the course taken for improving guardianship administration,--whether it be continued in the probate courts exclusively, whether the courts be assisted by departments of

¹Thurman, "Substantive Law and Procedure," Harvard Law Review, 1932, p. 631.

public welfare, or whether it be transferred to a strictly administrative body,--one thing stands out as of primary importance. This is the matter of personnel. The administration of law can be no better than those administering it. Persons carrying out the guardianship function of the state should be selected on the basis of training and ability. Once selected, they should be protected from local political pressure and from change in office of elected judges and executives. Standards for personnel can best be set by a state body such as a state judicial council or state department of public welfare. Selection could be made by the civil service commission or preferably by that commission with the aid of a professional advisory committee. If not done in these ways, the state authority could set up minimum requirements for personnel and permit the local authority to select officers in accordance with these requirements. It would be still better for the local authority to select its officers from an approved list compiled by the state authority. Such a list should be filled by examinations given on a strictly merit basis. Some assurance of permanent tenure must be given in order to attract highly qualified persons to enter this special service.

Furthermore, local courts or administrative units having guardianship jurisdiction should be supervised by a state authority. Such supervision is necessary, if uniform standards and records are to be obtained. In poorer localities, some state financial aid may be necessary to provide trained personnel. If uniform legislation should be adopted throughout the United States, a federal body, such as the United States Children's Bureau or a special committee appointed for that purpose by the Department of Justice, might lead the way in creating high standards of service and "equalizing the unequal places."

The need for a change in guardianship law and administration is obvious. The history of the law of guardianship shows that no change of importance has occurred in the past century or more, save that in connection with the rights of women. No changes have occurred in procedures for appointment and supervision. Times have changed; life has become urbanized, the close relationship of neighbors has largely disappeared, family ties have become looser, blood ties are weaker. The courts, particularly those in cities, deal with cases impersonally, and judges are without any personal knowledge of those appearing before them. The estates of minors are no longer largely real estate which could be recovered. The old laws cannot meet the exigencies which occur in connection with personal property. In spite of all these changes, the law of Guardian and Ward has remained essentially the same. What Clarence Darrow said of law generally is peculiarly applicable

to the law of guardianship. He said: "The whole material world has been made over but the law and its administration have stood adamant, defying time and eternity and all the intellectual and ethereal changes of our day and age."¹

The summary of the laws in the United States reveals multitudinous differences of little consequence. The inadequacies have been pointed out in connection with each feature. Uniform legislation has been accomplished in other laws. For all its minor variations, the law of Guardian and Ward offers relatively slight difficulties in achieving uniformity. In fact, a uniform guardianship law has already been attained for the beneficiaries of the United States Veteran's Administration. Various suggestions have been made which look toward improvements in the law. The substantive law of guardianship is satisfactory when minor differences have been ironed out. The procedural law needs reformation. The present administration of the law cannot meet the obligations of the state toward children in need of legal guardians.

Several suggestions have been made for improving the administration of the law of guardianship. These suggestions involve legislative action which would demand the addition of specialized services to the court. It has been suggested that guardianship of the person might be transferred to the juvenile court. Further, it has been suggested that social service and property departments be created in each local probate court, or that the social service be supplied through the cooperation of the court and the department of public welfare, or that guardianship administration be removed from the probate court and given to an administrative law tribunal equipped with specialized services. The experience of the Guardianship Subdivision of the United States Veterans' Administration has proven the need and value of supplemental services in connection with guardianship. The passive and formal position of the court is insufficient. The need for intelligent and specially qualified personnel has been pointed out and methods for their selection and maintenance named. The necessity for state supervision and the value of federal cooperation for purposes of uniformity and standardization have been commented upon.

The authority of the state as super-parent is clear. The principle that the child's own welfare is the concern of the state is also clear. Authority and responsibility cannot be separated. Although this authority has been delegated to local courts, the state cannot remain blind to the way its obligation is met. Thus far, on the whole, the state has not participated in this function

¹Clarence Darrow, The Story of My Life, p. 431.

for which it is responsible. The sovereign state, in this country representing the public, by reason of the accepted doctrine of parens patriae is a party to all guardianship proceedings. This third party cannot afford to remain silent. No public responsibility so clearly suggests state participation.

The present time, when many social and legal institutions are being reconsidered, abandoned, and reformed, offers a most opportune time for improving the law and administration of guardianship. Great public interest has been aroused in the field of Child Welfare. The relationship of Guardian and Ward should be included as a part of this general field. Thus far, it has been omitted. Lawyers, social workers, and judges should cooperate to bring to this relationship the best available services. They should arouse the public to a recognition of this unfilled responsibility of the state.

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Magna Carta (1215).
9 Henry III, c. 5 (1225).
53 Henry III, c. 16 (1267).
3 Edward I, c. 21 (1275).
20 Edward I, stat. 2 (1292).
27 Henry VIII, c. 10 (1535).
32 Henry VIII, c. 1 (1450).
32 Henry VIII, c. 46 (1540).
34 and 35 Henry VIII, c. 8 (1542-3).
4 and 5 Ph. and Mary, c. 8 (1557).
13 Elizabeth, c. 5 (1561-2).
27 Elizabeth, c. 4 (1585-6).
Acts and Ordinances of the Commonwealth (1646), I, 883.
Acts and Ordinances of the Commonwealth (1656), II, 1043.
12 Charles II, c. 24 (1660).
2 and 3 Victoria, c. 54 (1839).
36 and 37 Victoria, c. 12 (1873).
36 and 37 Victoria, c. 66 (1873).
49 and 50 Victoria, c. 27 (1886).
54 and 55 Victoria, c. 3 (1891).
8 Edward VII, c. 67 (1908).

TABLE OF CASES CITED

	Page
Allen v. Martin, 38 Ala. 442 (1862)	147
Ames v. Ames, 148 Ill. 321 (1894)	102
Arthur's Appeal, 1 Grant (Pa.) 55 (1854).	50
Austin v. Lamar, 23 Miss. 189 (1852).	131
Baldy v. Hunter, 98 Ga. 170 (1896).	84
In re Guardianship of Baptiste, 114 Okla. 116 (1925).	43
Barnard v. Barnard, 157 Md. 264 (1929).	34
Barnes v. Powers, 12 Ind. 341 (1859).	122
Bartee v. Tompkins, 36 Tenn. (4 Sneed) 623 (1857)	152
Battell v. Torrey, 65 N. Y. Court of Appeals 294 (1875)	94
Benson v. Benson, 239 N. W. 79 (1932)	147
In re Boyes' Estate, 151 Cal. 143 (1907).	76
Bradford v. Bodfish, 39 Iowa 691 (1874)	77
Brown v. Brown, 132 Ga. 712 (1909).	33
In re Bryan, 48 Nev. 352 (1925).	33
Bryce v. Wynn, 50 Ga. 332 (1873).	47
Burwell v. Burwell, 78 Va. 574 (1884)	84
Calhoun v. Calhoun, 41 Ala. 369 (1868).	76
Campbell v. Harmon, 43 Ill. 18 (1867)	98
Capps v. Hickman, 97 Ill. 429 (1881).	53
In re Carlson's Guardianship, 297 Pac. 764 (Wash. 1932)	147
In re Carver, 118 Cal. 73 (1897).	84
Case of Hampden (1696), see 21 Cyclo. of Law and Procedure, p. 18, note 48.	16
Charles v. Witt, 88 Kan. 484 (1913)	89
Cheney v. Roodhouse, 135 Ill. 257 (1890).	136
Clark v. Burnside, 15 Ill. 62 (1853).	93
Cogswell v. State, 65 Ind. 1 (1879)	131
Collins v. Superior Court of Monterey Co., 22 Cal. App. 579 (1921)	48
Cotton v. Goodson, 1 How. (Miss.) 295 (1836).	163
Cousin's Estate, 11 Cal. 441 (1896).	84
Cowles v. Cowles, 8 Ill. 435 (1845)	117, 156
Ex parte Crumb, 2 Johns. Ch. 439 (1817)	152
Daniels v. Charles, 174 Ky. 238 (1916).	93
Davidson v. Vampler, 29 Mont. 61 (1903)	93
Day v. Johnson, 158 Ark. 478 (1923)	99
In re DeSaulles, 167 N. Y. S. 445 (1917).	113
Detroit v. Blanchfield, 13 Fed. (2nd), 13, 47 A. L. R. 314 (1882)	101
Easton v. Somerville, 111 Iowa 164 (1900)	89
Edwards v. Talliafero, 43 Mich. 13 (1876)	94
Farrington v. Wilson, 29 Wis. 383 (1892).	102
Faulkner v. Davis, 18 Gratt (Va.) 651 (1868).	96
Field v. Herrick, 5 Ill. App. 54 (1879)	89
Foley v. Mutual Life Insurance Company, 138 N.Y. 333 (1893)	51
Folger v. Heidel, 60 Mo. 284 (1875)	77
Foster v. Young, 35 Iowa 27 (1872).	96
Freeman v. Wilson, 74 N. C. 549 (1876).	83
Fuller v. Wing, 17 Me. 222 (1840)	122

Gaines' Succession, 42 La. Ann. 699 (1890)	102
Garth v. Taylor, 115 Ky. 128 (1903)	48
In re Gibson, 154 Mass. 378 (1891).	115, 116
Given v. Pollack, 96 Okla. 25 (1923).	49
Gott v. Culp, 45 Mich. 265 (1881)	146
Graham v. Houghtalin, 30 N. J. L. 552 (1863)	50
Graham's Appeal, 1 Dallas Reports (Pa.) 146 (1785)	23
Green v. Barbee, 84 N. C. 69 (1881)	146
Hale v. Hale, 146 Ill. 227 (1893)	96
Ham v. Ham, 15 Gratt. (Va.) 74 (1859)	47
Hanley v. Russell, 63 N. H. 614 (1883).	116
In re Guardianship of Hann, 100 Cal. App. 743 (1924)	44
Hardin v. Taylor, 78 Ky. 593 (1879)	141
In the Matter of Harland, 4 Rawle 323 (1835).	147
Harston v. Barton, 43 S. W. (2nd) 630 Tex. (1931)	86
Henicle v. Flack, 3 Ohio, App. 444 (1914)	42
Horton's Appeal, 94 Pa. St. 62 (1880)	77
In re Howard's Guardianship, 24 P (2nd) 482 (1933)	157
Hoyt v. Sprague, 103 U. S. 623 (1880)	102
Hughes v. Green, 111 S. C. 453 (1918)	96
In re Hunter, 14 Grant Ch. (U.C.) 680 (1868).	97
Huso v. Jasper, 48 N. D. 102 (1921)	88
Hutchins v. Dresser, 26 Me. 76 (1846)	89
Inferior Court v. Cherry, 14 Ga. 592 (1854)	47
Isaacs v. Taylor, 3 Dana (Ky.) 600 (1835)	53, 153
Jenkins v. Whyte, 62 Md. 427 (1884)	131
In re Johnson, 87 Iowa 130 (1893)	36, 102
Matter of Jones, 4 Sandf. Ch. (N.Y.) 615 (1847)	146
Kelly v. Edwards, 38 Mich. 210 (1878)	116
Kelly v. Smith, 12 Ala. 687 (1849).	47, 49
Kettletas v. Gardner, 1 Paige (N.Y.) 488 (1829)	154
King v. Hughes, 52 Ga. 600 (1874)	152
Kinter's Appeal, 62 Pa. St. 318 (1869).	141
Kimmel v. Kimmel, 48 Ind. 203 (1874).	122
In re Kirkman's Estate, 168 Cal. 688 (1914)	48
Lacy v. Williams, 27 Mo. 280 (1858)	102
Lamar v. Micou, 112 U. S. 452, 5 S. Ct. 221 (1884).	102
In re Lapides, 258 N. Y. S. 799 (1932).	76
Leary v. Fletcher, 23 N. C. 259 (1840).	98
Lee's Appeal, 27 Pa. St. 229 (1856)	46
Lee v. Lee, 55 Ala. 590 (1876)	102
Linder v. Holmes, 2 Ind. 629 (1851)	97
Long v. Long, 62 Md. 33 (1883).	96
Lynn v. Lynn, 17 Ky. L. Rep. 1364 (1896).	97
Mahan v. Trantveter, 305 Ill. 395 (1922)	118
In re Marchand's Guardianship, 137 Ore. 444 (1931).	78
In re Guardianship of Marmaduke, 130 Cal. 449 (1933).	34
Mattox v. Patterson, 60 Iowa 434 (1883).	147
Mauro v. Ritchie, Fed. Case, No. 9, 312 (1827).	47
May v. Duke, 61 Ala. 53 (1878).	88
May v. May, 109 Mass. 252 (1872).	147
McCoy v. Furgerson, 172 Ky. 235 (1916).	89
Mead v. Makewell, 8 Mo. App. 549 (1880)	152
In re Mells, 64 Iowa 391 (1884)	76
Merrill v. Harris, 65 Ark. 355 (1898)	96
Mills v. McAllister, 2 N. C. 303 (1796)	50
Mitchell v. Webb, 2 Lea (Tenn.) 150 (1879).	106
Montgomery v. Smith, 3 Dana (Ky.) 599 (1835).	47
Moore's Estate, 9 Phila. (Pa.) 326 (1873)	97
Morgan v. Johnson, 68 Ill. 190 (1873)	83

Murphree v. Hanson, 197 Ala. 346 (1916)	156
Musgrave v. Conover, 85 Ill. 374 (1877)	98
Nagle v. Robins, 9 Wyom. 211 (1900)	84
Nation v. Green, 188 Ind. 697 (1919)	41, 43
National Surety Co. v. Manhattan Mortgage Company, 174 N. Y. S. 9 (1919)	88
Nielson v. Cook, 40 Ala. 498 (1868)	147
In re O'Connell, 102 Iowa 355 (1897)	25, 36
Osborne v. Monroe, 43 N. J. Eq. 248 (1887)	84
Palmer v. Chesebory, 55 Conn. 114 (1887)	89
Pell v. McCarthy, 38 Miss. 451 (1888)	119
Phillips v. Lockwood, 4 Dem. (N.Y.) 299 (1885)	146
In re Pinnell's Guardianship, 180 Cal. 270 (1920)	113
Pugh v. Bowden, 154 Fla. 302 (1907)	46
Raines v. Harris, 150 Ga. 103 (1920)	40
Rankin v. Miller, 43 Iowa 11 (1897)	98
In re Reimenschneider, 164 N. W. 736 (Iowa, 1917)	118
Matter of Rhoades, 172 N. Y. S. 399 (1918)	150
Rice's Case, 42 Mich. 528 (1880)	53
Richardson v. Richardson, 49 Mo. 29 (1871)	93
In re Rickard, 15 Abb Pr. N. S. (N.Y.) 6 (1873)	53
Roach v. Jelks, 40 Miss. 754 (1866)	146
Rule v. Roach, 58 Miss. 552 (1880)	98
Schmidt v. McBean, 98 Ill. App. 421 (1881)	83
Schneider v. Burns, 45 La. Ann. 875 (1893)	131
Scott v. Brown, 160 Ark. 489 (1923)	102
Sherman v. Ballou, 8 Cw. (N.Y.) 304 (1828)	43, 103
Shumard v. Phillips, 53 Ark. 37 (1890)	117
Singleton v. Murray, 1 Head (Tenn.) 257 (1858)	96
Smoot v. Bell, Fed. Case, No. 13, 132, 3 Cranch C.C. 342 (1828)	47
Spears v. Spears, 173 La. 294 (1931)	99
Spring v. Woodworth, 9 Allen 326 (1862)	77
Starrett v. Jameson, 29 Me. 504 (1848)	131
State v. Williams, 107 W. Va. 450 (1929)	34
Stetina v. Bergstein, 204 Mo. App. 366 (1920)	32
Stokes v. Payne, 58 Miss. 614 (1881)	93
In re Stude's Estate, 179 Iowa 785 (1917)	88
Sylvester v. Ralston, 31 Barb. (N.Y.) 286 (1860)	51
Taylor v. Kellog, 103 Mo. App. 258 (1903)	93
Thaw v. Ritchie, 4 Mackey (D.C.) 347 (1886)	96
Thomas v. Williams, 9 Fla. 289 (1860)	107
In re Thorne's Estate, 213 N. Y. S. 419 (1925)	106
Thurmond v. Faith, 69 Ga. 832 (1883)	83
Van Rees v. Witzenburg, 112 Iowa 30 (1900)	142
In re Waite, 190 Iowa 182 (1920)	32
Walker v. Thompson, 145 Ky. 597 (1911)	93, 94
Wallace v. Jones, 93 Ga. 419 (1893)	96
Walton v. Erwin, 1 Ired. Eq. 136 (1840)	44, 146
Walton v. Twiggs, 91 Ga. 90 (1892)	44
Wellesley v. Duke of Beaufort, 2 Russell 1 (1827)	16
Wells v. Andrews, 60 Miss. 374 (1882)	102
Wentz's Appeal, 76 Conn. 405 (1904)	102
William's Appeal, 119 Pa. St. 87 (1888)	147
Williamson v. Berry, 8 How. (U.S.) 495 (1850)	102
Willis v. Fox, 25 Wis. 646 (1870)	101
White v. Nesbit, 21 La. Ann. 600 (1869)	83
Whitlock v. Whitlock, 1 Dem. Surr. (N.Y.) 160 (1882)	51
Re Mallie Woods, 158 Tenn. 383 (1929)	106

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INDEX

- Adoption, 171,172
- Alabama:
 - bond, 127
 - compensation, 145
 - inventory, 87,88
 - investment, 121
 - jurisdiction, 104
 - leasing, 90-91
 - management of estate, 80
 - nomination by minor, 45,47,49
 - preference, 54
 - public guardian, 62
 - residence requirements, 71
 - sale, 95
 - termination, 150
 - testamentary, 38,42
- American Colonies, 18-25
- Annual accounts, 161
- Appointment procedure, 28,109-118, 159
- Appraisal, 123, 124
- Arizona:
 - bond, 126
 - compensation, 143
 - expenditures, 73
 - investment, 121
 - jurisdiction, 107
 - lease, 90,91,92
 - management of estate, 80
 - mortgage, 94
 - nomination by minor, 45
 - periodical accounts, 131
 - person, 69
 - petition, notice, hearing, 116
 - preference, 54
 - residence, 71
 - support, 73,75
 - termination, 151
 - testamentary, 38
- Arkansas:
 - accounting, 131
 - bond, 127
 - compensation, 144
 - inventory, 85, 88
 - investment, 122
 - jurisdiction, 104
 - lease, 90
 - person, 68
 - petition, notice, hearing, 115
 - sale, 95
 - settlement, 141,139
 - support, 74
 - temporary arrangement, 112
 - termination, 149,151
 - testamentary, 37,42
- Bond, 22, 124-130, 160
- Borough Guardianship, 13, 14
- California:
 - bond, 127
 - compensation, 143
 - inventory, 89
 - investment, 121
 - jurisdiction, 107
 - lease, 91
 - management of estate, 80
 - mortgage, 94
 - nomination by minor, 44,48
 - periodical accounting, 132
 - person, 70
 - preference, 54
 - residence, 71
 - sale, 95
 - settlement, 138
 - temporary arrangement, 112
 - termination, 151
 - testamentary, 38
- Chancery, 17
 - power of, 52
- guardians, 12,16,17,19,24
- courts, 106-108
- Change of guardians, 151
- Child Welfare, 1,2,170-178
- Circuit courts, 108
- Colonial Legislation, 15-25
 - in Connecticut, 20
 - in Delaware, 22
 - in Massachusetts, 19
 - in New Hampshire, 20
 - in New York, 20
 - in North Carolina, 21
 - in Pennsylvania, 22
 - in Virginia, 21,22
- Colorado:
 - bond, 127
 - compensation, 145
 - inventory, 87,88
 - investment, 122
 - jurisdiction, 105
 - lease, 90,91
 - nomination by minors, 45

Colorado—(Continued):

- person, 70
- petition, notice, hearing, 115
- sale, 95
- settlement, 139
- temporary arrangement, 111
- testamentary, 37
- Common law, 21, 50, 51
- Compensation, 142-148, 162
- Connecticut:
 - accounting, 131
 - bond, 126
 - investment, 121
 - jurisdiction, 104
 - lease, 91
 - mortgage, 94
 - nomination by minor, 44
 - person, 68
 - sale, 95
 - temporary arrangement, 112
 - termination, 151
 - testamentary, 37
- Courts having jurisdiction, 101-109
- Court appointed guardians, 27, 52-56
- County court, 105

Delaware:

- appraisal, 123
- bond, 126
- inventory, 85-87
- investment, 121
- jurisdiction, 108
- lease, 91
- nominated by minors, 44
- periodical accounting, 132
- person, 68
- sale, 95
- settlement, 139
- support, 74
- termination, 150
- testamentary, 39
- District Court, 107, 108
- District of Columbia:
 - accounting, 132
 - bond, 127
 - jurisdiction, 104
 - lease, 91
 - mortgage, 94
 - nomination by minor, 45, 47
 - preference, 54, 55
 - sale, 95
 - settlement, 139
 - support, 74
 - termination, 149
- Divorce, 33, 166

- Ecclesiastical court, 12
- Education of ward, 24, see guardianship of the person
- Election of an infant, 12, 20, 43, 50
- Equal Rights, 32, 159
- Expenditures, 72-77

- Family meetings, 82
- Feudal guardianship, 9-12, 14, 15
- Final Settlement, 137-142
- Florida:
 - accounting, 131
 - bond, 126
 - inventory, 85-88
 - investment, 121
 - jurisdiction, 105
 - sale, 95
 - settlement, 139
 - termination, 150
 - testamentary, 38

Georgia:

- accounting, 131
- bond, 126
- lease, 92
- nomination by minors, 45, 47
- petition, notice, hearing, 115
- preference, 55
- public guardian, 62
- sale, 95
- temporary arrangement, 111
- testamentary, 39, 40
- Guardian, 27-28
 - ad litem, 52, 59-61, 71, 81, 91, 98, 110, 139, 159, 161, 162
 - definition, 3, 5
 - "joint," 32
 - knight's service, 9, 10, 23
 - nomination by minor of, 43-50
 - qualifications of, 6, 7
- Guardianship of person, 67-77
- social aspects of, 5, 6, 170-178
- testamentary, see testamentary

- Hearing, 113, 117, 118
- History of, 9-30

Idaho:

- allowances, 75
- bond, 126
- compensation, 143
- investment, 121
- jurisdiction, 104

Idaho—(Continued):

- lease, 90, 91
- management of estate, 80
- mortgage, 94
- nomination by minor, 44
- periodical accounting, 131
- person, 68
- petition, hearing, notice, 116
- sale, 95
- support, 75
- termination, 151
- testamentary, 38

Illegitimate child, 37,40,41

Illinois:

- accounting, 132
- bond, 127
- compensation, 143
- court appointed, 53
- inventory, 85,87,88
- investment, 121
- jurisdiction, 105
- lease, 91
- management of estate, 80
- mortgage, 94
- nomination by minor, 44
- person, 70
- petition, notice, hearing, 116
- public guardian, 62
- residence, 72
- sale, 95
- settlement, 139
- termination, 149
- testamentary, 38

Indiana:

- bond, 127
- compensation, 143
- inventory, 85
- investment, 121
- management of estate, 80
- mortgage, 94
- nomination by minors, 45
- periodical accounts, 132
- person, 68
- preference, 55
- sale, 95
- settlement, 140
- testamentary, 39, 43

Inventory, 20,23,118-124,160

Investment, 83-89

Iowa:

- accounting, 131
- bond, 127
- compensation, 144
- inventory, 88
- investment, 122
- jurisdiction, 107
- mortgage, 94
- nomination by minor, 45
- person, 68
- sale, 95

- settlement, 140
- support, 76

Jurisdiction:

- courts having, 101-109
 - overlapping, 169
 - prerequisites, 56
- Juvenile court, 44, 163-173

Kansas:

- accounting, 132
- compensation, 144
- investment, 121, 127
- jurisdiction, 104
- mortgage, 94
- nomination by minor, 45
- person, 68
- sale, 95
- settlement, 140, 141
- testamentary, 37

Kentucky:

- accounting, 132
 - bond, 126
 - compensation, 144
 - expenditures, 73
 - inventory, 85
 - investment, 121
 - jurisdiction, 105-6
 - lease, 90-92
 - nomination by minor, 45, 47
 - person, 69
 - preference, 55
 - public guardian, 62
 - settlement, 140, 141
 - support, 73
 - termination, 150
 - testamentary, 37, 43
- Kinds of guardians:
- knight's service, 18

Lease, 89-93

Louisiana:

- accounting, 132
- bond, 127
- compensation, 145
- expenditures, 73
- inventory, 85
- investment, 122
- jurisdiction, 104
- lease, 92
- person, 69
- petition, notice, hearing, 115
- support, 73
- temporary arrangement, 112
- termination, 150
- testamentary, 37

Maine:

- accounting, 132
- allowance, 75
- bond, 126
- investment, 122
- jurisdiction, 104
- lease, 92
- management of estate, 80
- mortgage, 94
- nomination by minor, 45, 47
- person, 68
- sale, 95
- termination, 150
- testamentary, 39, 42

Majority, 149, 150

Management of estate, 78-100

Marriage, 150

Maryland:

- accounting, 132
- appraisal, 123
- bond, 128
- compensation, 144
- inventory, 121
- jurisdiction, 108
- lease, 90
- petition, notice, hearing, 115, 116
- sale, 95
- settlement, 139
- support, 74
- termination, 149, 150
- testamentary, 37

Massachusetts:

- accounting, 132
- allowance, 75
- bond, 126
- compensation, 143
- investment, 121
- jurisdiction, 104
- management of estate, 80
- mortgage, 94
- nomination by minor, 45
- person, 68
- petition, hearing, notice, 116
- sale, 95
- termination, 150
- testamentary, 39

Michigan:

- accounting, 132
- allowance, 75
- bond, 126
- compensation, 143
- inventory, 85
- investment, 122
- management of estate, 80
- mortgage, 94
- nomination by minor, 45
- person, 68
- petition, hearing, notice, 116
- sale, 95

- support, 75
- temporary arrangement, 111
- termination, 150
- testamentary, 37

Minnesota:

- accounting, 132
- inventory, 85
- investment, 121
- jurisdiction, 104
- lease, 91
- management of estate, 80
- mortgage, 94
- nomination by minor, 45, 47
- person, 68
- sale, 95
- settlement, 139
- support, 75
- temporary arrangement, 111
- termination, 150
- testamentary, 38, 42

Mississippi:

- accounting, 132
- allowance, 75
- bond, 128
- compensation, 145
- jurisdiction, 106
- lease, 90
- mortgage, 94
- nomination by minor, 45
- person, 70
- preference, 55
- public guardian, 62
- sale, 95
- support, 74
- temporary arrangement, 111, 112
- termination, 149, 150
- testamentary, 37, 42

- testamentary, 37, 42

Missouri:

- accounting, 132
- bond, 128
- compensation, 144
- court appointed guardian, 53
- inventory, 85, 87, 88
- investment, 122
- jurisdiction, 104
- lease, 91
- mortgage, 94
- person, 68, 70
- sale, 95
- settlement, 139, 141
- support, 74
- termination, 150
- testamentary, 37, 42, 43

Montana:

- accounting, 132
- allowance, 75
- bond, 126
- compensation, 143
- jurisdiction, 107

Montana—(Continued):

- investment, 121
- lease, 91
- management of estate, 80
- mortgage, 94
- person, 68
- petition, hearing, notice, 116
- preference, 55
- sale, 95
- support, 75
- termination, 151
- testamentary, 37

Mother:

- rights of, 25

Mortgaging real estate, 93-95

Nature:

- guardian by, 12

Natural guardian, 3, 31-35

Nebraska:

- allowance, 75
- bond, 126
- compensation, 143
- expenditures, 73
- inventory, 121
- investment, 85
- jurisdiction, 105
- management of estate, 80
- mortgage, 94
- nomination by minor, 45
- person, 69
- sale, 95
- support, 73
- termination, 150
- testamentary, 37, 42

Nevada:

- accounting, 132
- allowance, 76
- bond, 126
- compensation, 143
- expenditures, 73
- inventory, 121
- jurisdiction, 106, 107
- nomination by minor, 45
- person, 68
- sale, 95
- support, 73
- termination, 149
- testamentary, 37

New Hampshire:

- accounting, 132
- bond, 126
- inventory, 121
- investment, 85, 88
- jurisdiction, 104
- lease, 91
- mortgage, 94
- nomination by minor, 45
- person, 69

- petition, notice, hearing, 115
- preference, 55
- sale, 95
- settlement, 140
- testamentary, 37

New Jersey:

- accountings, 132
- allowance, 76
- bond, 126
- compensation, 145
- inventory, 121
- investment, 85
- mortgage, 94
- nomination by minors, 45
- person, 68
- preference, 55
- sale, 95
- socage, 50
- support, 74
- testamentary, 38

New Mexico:

- accounting, 132
- bond, 127
- jurisdiction, 104
- lease, 90
- nomination by minor, 45
- person, 68
- sale, 95
- settlement, 139
- support, 73
- termination, 150
- testamentary, 39, 42

New York:

- jurisdiction, 105
- mortgage, 94
- person, 68
- sale, 95
- settlement, 139
- socage, 51
- support, 76
- temporary arrangement, 113
- termination, 150
- testamentary, 37

"Next friend," 11, 15, see
ad litem

Nomination by minor, 43-50

North Carolina:

- accounting, 132
- bond, 127
- compensation, 144
- inventory, 121
- jurisdiction, 107
- lease, 90, 92
- mortgage, 94
- petition, notice, hearing, 116
- public guardian, 62
- sale, 95
- support, 74
- temporary arrangement, 112
- termination, 150

North Carolina—(Continued):

—testamentary, 38

North Dakota:

—accounting, 132

—allowance, 76

—bond, 127

—compensation, 143

—inventory, 121

—jurisdiction, 105

—nomination by minor, 45

—person, 68

—petition, notice, hearing, 116

—preference, 54

—sale, 95

—support, 75

—testamentary, 38

Notice, 113-116

Nurture:

—guardian by, 12

Ohio:

—accounting, 132

—bond, 128

—compensation, 143

—inventory, 86-88

—investment, 121

—jurisdiction, 104

—lease, 90-93

—nomination by minor, 45

—person, 69, 70

—preference, 55

—sale, 95

—settlement, 138, 141

—termination, 150

—testamentary, 37, 42

Oklahoma:

—accounting, 132

—bond, 126

—compensation, 145

—inventory, 121

—jurisdiction, 105

—management of estate, 80

—nomination by minor, 45, 49

—person, 69

—petition, notice, hearing, 116

—preference, 54

—residence, 71

—sale, 95

—settlement, 138

—support, 75

—termination, 151

—testamentary, 38

Oregon:

—bond, 126

—compensation, 143

—inventory, 122

—jurisdiction, 105

—management of estate, 80

—nomination by minor, 45, 47

—person, 68

—preference, 55

—sale, 95

—termination, 150

Orphans Court, 13, 19, 23, 24, 108

Parens patriae, 4, 5, 12, 16, 35, 157, 167

Parent and Child, 5, 31, 33, 34, 26

Pennsylvania:

—accounting, 132

—bond, 126

—court appointment, 53

—inventory, 121

—investment, 87

—jurisdiction, 108

—mortgage, 94

—nomination by minor, 45

—person, 70

—sale, 95

—final settlement, 139

—testamentary, 37

Periodical accounting, 130-137

Petition, 113, 114

Preference:

—in appointment, 52-54

Prerogative of Royal Family, 12

Primogeniture, 18

Probate Court, 104, 105, see
courts having jurisdiction

Procedure, 4, 109-118

Public administrator, 62, 63, 64

Public guardian, 61-66, 112

Public Welfare, 170-178

—department of, 173

Real Estate:

—leasing, 89-93

—management of, 70-100

—mortgaging, 93-95

—sale, 24, 95-100

Release:

—by ward, 138-141

Removal of guardian, 152-157

—residence requirements, 71, 72

Resignation, 146, 151, 152, 163

Rhode Island:

—accounting, 132

—bond, 126

—compensation, 144

—inventory, 121

—investment, 85, 87, 89

—jurisdiction, 104

—lease, 92

Rhode Island—(Continued):

- management of estate, 80
- nomination by minor, 45
- person, 68
- petition, notice, hearing, 115
- sale, 95
- testamentary, 39

Sale of real estate, 24, 95-100

Socage guardianship, 11, 15, 18, 23, 49, 52, 159

Social case work, 4, 6-8, 67, 77, 167, 170-174

Social welfare, 5-8, etc.

South Carolina:

- accounting, 132
- bond, 127
- compensation, 144, 146
- inventory, 121
- investment, 87
- jurisdiction, 104
- nomination by minor, 45
- person, 68
- public guardian, 62
- sale, 95
- settlement, 140
- socage, 50
- temporary arrangement, 111
- termination, 149
- testamentary, 38

South Dakota:

- accounting, 132
- bond, 126
- compensation, 143
- inventory, 121
- jurisdiction, 105
- management of estate, 80
- mortgage, 94
- nomination by minor, 45
- person, 68
- petition, notice, hearing, 116
- preference, 54
- sale, 95
- support, 75
- termination, 151
- testamentary, 38

Support, see Expenditures

Sureties, see Bond

Suretyship, 13

Temporary arrangements, 27, 11, 113

Tennessee:

- accounting, 132
- bond, 127
- compensation, 144
- inventory, 122
- investment, 85-88

—jurisdiction, 105, 106

—mortgage, 94

—person, 70

—petition, notice, hearing, 115

—preference, 53

—public guardian, 62

—sale, 95

—settlement, 139

—support, 74

—termination, 150

—testamentary, 38

Termination, 149-157, 163

Testamentary, 13-15, 18-22, 23, 25, 35-43

Texas:

—accounting, 132

—bond, 126

—investment, 86

—jurisdiction, 105

—mortgage, 94

—nomination by minor, 45

—petition, notice, hearing, 115

—sale, 95

—settlement, 141

—termination, 150

—testamentary, 37

Uniform legislation:

—committee on, 158-164

Uniform Veterans' Guardianship

Act, 27, 57-59, 147, 158

U. S. Veterans' Administration, 6, 27, 57-59, 108, 136, 172, 173

Utah:

—accounting, 132

—allowance, 76

—compensation, 143

—expenditures, 73

—inventory, 121

—investment, 85

—jurisdiction, 107

—lease, 92

—management of estate, 80

—nomination by minor, 45

—person, 69

—petition, notice, hearing, 116

—preference, 54

—residence, 71

—sale, 95

—settlement, 138

—support, 73

—termination, 151

—testamentary, 38

Vermont:

—accounting, 132

—compensation, 144

Vermont--(Continued):

- expenditures, 73
- jurisdiction, 104
- management of estate, 80
- nomination by minor, 45
- person, 69
- petition, notice, hearing, 115
- preference, 55
- sale, 95
- settlement, 139
- support, 73
- termination, 150
- testamentary, 39, 42

Virginia:

- accounting, 132
- compensation, 144
- expenditures, 73
- inventory, 121
- investment, 86
- mortgage, 94
- nomination by minor, 45, 47
- person, 70
- sale, 95
- support, 73
- temporary arrangement, 111
- testamentary, 39, 42

Wards:

- allowances, 24
- marriage, 10, 11
- state responsibility, 4, 170-178

Washington:

- accounting, 132
- bond, 127
- compensation, 143
- inventory, 121
- jurisdiction, 107
- lease, 91
- mortgage, 94
- person, 70
- sale, 95
- termination, 150
- testamentary, 37, 42

West Virginia:

- accounting, 133
- bond, 127

- expenditures, 73
- investment, 86
- jurisdiction, 105, 106
- lease, 91
- mortgage, 94
- nomination by minor, 45
- preference, 55
- sale, 95
- settlement, 140
- support, 73
- temporary arrangement, 111
- testamentary, 39, 42, 43

Wisconsin:

- accounting, 132
- bond, 127
- compensation, 143
- expenditures, 73
- jurisdiction, 105
- lease, 90, 92
- management of estate, 80
- mortgage, 94
- nomination by minor, 45
- person, 70
- petition, notice, hearing, 115
- sale, 95
- support, 73
- temporary arrangement, 111
- termination, 150

Women:

- rights of married, 25

Wills, see testamentary

Wyoming:

- accounting, 133
- allowance, 76
- bond, 127
- compensation, 143
- inventory, 121
- investment, 85, 87
- jurisdiction, 107
- management of estate, 80
- mortgage, 94
- nomination by minor, 45
- petition, notice, hearing, 116
- sale, 95
- support, 75
- termination, 151
- testamentary, 37

